(21,963.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 187.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. M. CARL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 *Transcript.*

Pleas Before Hon. J. S. Maples, in the Benton Circuit Court, September Term, 1908.

J. M. CARL, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

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Costs in Lower Courts.

Costs in J. P. Court		$5.15	
" in Circuit Court:			
Clerk	1.60		
Sheriff	.30		
Witnesses:			
Plaintiffs			
Defendants			
Jury tax	3.00		
		$4.90	
			$10.05
Transcript			8.00
			18.05
Postage			.25
			$18.30

2 *Transcript from Justice Peace Court.*

In the Benton Circuit Court, September Term, 1908.

Be it remembered, That on the 6th day of August, 1908, the following transcript of judgment from the J. P. Court, of Gentry Township, in Benton County, Arkansas, duly certified by J. B. Whiteside J. P. of said Gentry Township, was duly filed in the office of the Circuit Clerk of Benton County, Arkansas, as follows, to wit:

STATE OF ARKANSAS,
Benton County,
Gentry Township:

Justice Court, said Township—J. B. Whiteside, J. P.

J. M. CARL, Plaintiff,
vs.
KANSAS CITY RAILWAY COMPANY, Defendant.

On the 29th day of June 1908, the Plaintiff filed before me, cause of action against the defendant for $99.99 as follows, to wit:

For loss of one Box of Household goods, value of said goods $75.00 and damage by reason of the detention of said goods, $24.99, shipped from Lawton Oklahoma, Oct. 9th, 1907, care of said K. C. S. R. and delivered to K. C. S. Ry. at Howe, Oklahoma.

Thereupon a writ of summons was issued against defendant returnable on the 10th day of July 1908 at 10 o'clock A. M. and delivered to the constable of Gentry (No. 19 N. R. 33 W.) Township, and returned, served by reading summons to E. L. Adams Station Agent for said Ry. Co., and delivering a copy thereof, to said Station Agent June 29th, 1908.

The day set for trial, July 10th, 1908, plaintiff J. M. Carl appeared; No appearance by the defendant, the K. C. S. Railway Company, the cause was continued until 1 o'clock P. M. of said day, when judgment by default was rendered against said Kansas City Railway Company, defendant, for $99.99 judgment and cost of suit.

The following is a true list of all papers in the above entitled cause, to wit:

Summons, Execution, Notice or Certificate of issuance of execution, Demand and Demand marked "A" Summons marked "B," Execution marked "C," Certificate of appeal marked "E."

Justice's Court, Gentry Township—J. B. Whiteside, J. P.

STATE OF ARKANSAS,
County of Benton,
Gentry Township:

J. M. CARL, Plaintiff,
against
KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

I, J. B. Whitesides a Justice of the Peace, within and for the Township of Gentry, in said County, do hereby certify that the foregoing is a complete and perfect transcript from my Docket of the proceedings and judgment in the above case, together with all the process and all the papers relating to said suit.

Given under my hand, this 5 day of July, 1908.

J. B. WHITESIDES, *J. P.*

Justice's Fees	$3.80
Constable's "	1.85

Together with an affidavit for an Appeal duly verified as required by law from the order and judgment rendered in said J. P. Court as above set out, and accompanied by a good and sufficient Bond of Appeal, and pursuant to the provision of law said cause was duly tried in the Circuit Court of Benton County, Arkansas, as hereinafter set out in the following pages of this transcript.

4 *Answer.*

In the Benton Circuit Court.

J. M. CARL, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Answer.

Comes the defendant and for answer herein states as follows: This defendant denies that the plaintiff delivered to the Chicago, Rock Island & Pacific Railway Company the goods claimed to have been lost and denies that said goods were of the value alleged in the complaint herein.

Further answering the defendant admits that said Household goods were delivered to the Chicago, Rock Island & Pacific Railway Company at the town of Lawton in the State of Oklahoma, which were delivered to said Chicago, Rock Island & Pacific Railway Company on the 8th, day of October, 1907, and that said goods were shipped upon a contract between the plaintiff and said Chicago, Rock Island & Pacific Railway Company, and its connecting carriers, and that this defendant is one of the connecting carriers and is entitled to the benefit of all the provisions of said contract. In said contract and agreement signed by the plaintiff it was agreed that in consideration that the plaintiff would receive the lower of two freight rates, in case of loss said goods should be valued at $5.00 per cwt. All of the goods received weighed 400 pounds. There was delivered to plaintiff by the defendant 300 pounds of said goods and this defendant received the amount of household goods which it delivered to the plaintiff and delivered to the plaintiff all of said household goods which it received.

Said defendant further alleges that on account of the manner in which said goods were boxed it is impossible to tell what part of said goods were delivered and what were lost, but this defendant alleges that none of said goods were lost on the line of road of this defendant.

5 This defendant further alleges that if it should be mistaken in that and if any of the goods were lost by this defendant, then the plaintiff is entitled to recover only $5.00 per cwt. for the goods lost and that the goods lost did not exceed in weight the sum of 100 pounds.

Further answering this defendant alleges that by reason of the plaintiff signing and executing the contract releasing in case of loss

this defendant to the extent of $5.00 per cwt., the said plaintiff received the benefit of a lower freight rate.

Further answering this defendant states that the contract entered into between the plaintiff and the defendant provided that notice should be given before suit was brought and this defendant alleges that the plaintiff no time gave them any notice of said loss provided in said contract.

Premises considered defendant prays judgment for costs.

READ & McDONOUGH,
Attorneys for Defendant.

6 *Opening Order Benton Circuit Court.*

In the Benton County Circuit Court, September 21st, 1908.

Be it remembered that at a regular term of the Benton County Circuit Court, begun and held at the Courthouse in Bentonville, Benton County, Arkansas, on Monday, September the 21st 1908, the same being the third Monday in said month and being the day fixed by the laws of the State of Arkansas for the convening of said Circuit Court, when were present and presiding the Hon. J. S. Maples, Judge of the 4th Judicial Circuit of Arkansas, of which Benton County forms a part; D. B. Horsely, Esq., Prosecuting Attorney of said 4th Judicial Circuit; James Hickman, Sheriff; W. T. Maxwell, Clerk, when the following proceedings were had and done, to wit:

And among other orders the following:

Answer Filed.

No. 37.

J. M. CARL
vs.
KANSAS CITY SOUTHERN RY. CO.

SEPT. 24, 1908.

On this day answer of defendant is filed.

Trial and Verdict.

No. 37.

J. M. CARL
vs.
KANSAS CITY SOUTHERN RAILWAY CO.

OCT. 5, 1908.

Now on this day this cause comes on for trial and the plaintiff appears in person and by his attorneys and defendants by its attorney and both parties announce ready.

Thereupon came W. T. Marrs and 11 other jurors of the regular panel, who are duly sworn and accepted to try this cause.

And having heard the evidence, the instructions of the Court, and the argument of counsel, said jury retired to consider of its verdict, and after due deliberation returned into Court the following verdict to wit:

"We the jury find for the plaintiff in the sum of $75.00.

W. T. MARRS. *Foreman.*"

7 *Judgment.*

It is therefore considered, ordered and adjudged by the Court that the plaintiff, J. M. Carl, do have and recover of and from the defendant, The Kansas City Southern Railway Company and the United States Fidelity and Guaranty Co., the surety on its appeal bond the sum of seventy five dollars, and all its cost in this suit laid out and expended, both in this Court and in the Court below.

Motion for New Trial Overruled and Appeal Prayed.

No. 37.

J. M. CARL
vs.
KANSAS CITY SOUTHERN RAILWAY CO.

OCT. 5, 1908.

On this day motion for new trial filed and the same is by the Court overruled.

The defendant excepts and prays an appeal to the Supreme Court which appeal is by the Court granted, and defendant is given 60 days to prepare and file bill of exceptions.

8 *Bill of Exceptions.*

STATE OF ARKANSAS,
County of Benton, ss:

In the Circuit Court.

J. M. CARL, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, That on the 5th day of October, 1908, the said day being a day of the regular term of the Benton circuit court, the above entitled cause came on for trial, plaintiff being represented by his attorneys, Messrs. McGill & Linsey, and the defendant being

represented by its attorneys, Messrs. Read & McDonough, the plaintiff to maintain the issues on his part introduced the testimony as shown below; the said evidence was taken down at the time in shorthand by H. A. Woestman, and afterwards the notes of said shorthand were transcribed and are fully set out below; the said transcribed notes contains all of the evidence introduced by either party on the trial of said cause, and also contains and shows all the exceptions taken by either party to the introduction of evidence, or to the exclusions of evidence, the court's rulings thereon and each party's exceptions thereto; the said evidence is in words and figures as follows, to wit:—

9 *Direct Examination of J. M. Carl.*

J. M. CARL, the plaintiff, being produced and sworn in his own behalf, testified as follows, to wit:—

Direct examination by Mr. LINDSEY:

Question. State your name to the jury?
Answer. J. M. Carl.
Q. You are the plaintiff in this case?
A. Yes sir.
Q. Where do you live, Mr. Carl?
A. I am at Gentry.
Q. Man of family?
A. Yes, sir.
Q. How long have you lived in that community?
A. Nearly all my life, except a year; I was gone a year when I came back last October 9th.
Q. State whether or not from some point in Oklahoma you shipped some household goods, and other goods sued for here, the value of them, to this town of Gentry, Arkansas, in this county?
A. Last fall, I was going to move back from Lawton, Oklahoma; about the 8th of October I fixed up two boxes of household goods and one barrel. The barrel contained rubbish and I think about four cans of fruit, and I taken them down to the Rock Island depot, and the other agent told me to dump them into the box car, and the drayman backed up to the box door; and he asked me how many was there, and I told him there was two boxes and a barrel——

Mr. MCDONOUGH: I object to any conversation.

10 Q. All right. Did you deliver the goods to the railroad company, at Lawton, Oklahoma?
A. Yes, sir.
Q. What company was that?
A. It was the Rock Island.
Q. Does that railroad or any part of its system run through Oklahoma and Howe?
A. It runs to Howe and through Howe.
Q. Where did you ship these goods to?
A. Gentry, Benton County, Arkansas.

Q. Did you get a bill of lading or receipt for those goods at the time you shipped them?
A. I got a bill of lading or something about it.
Q. Who gave it to you?
A. The fellow at Lawton who received them in the car.
Q. What did you do with the bill of lading?
A. I brought it to Gentry and brought it for the goods.
Q. Did you receive any of those goods?
A. I received the barrel at the time.
Q. Did you receive any other goods but the barrel?
A. No, sir; not for about three months, and then I received the small box.
Q. Was there a box which you shipped that you never received?
A. Yes, sir.
Q. I want to ask you what become of the bill of lading or receipt that you got from the company, or the paper that they gave you?
A. The agent taken it.
11 Q. What agent?
A. At Gentry.

Mr. McDonough: I have the bill of lading if you desire to introduce it.
Mr. Lindsey: I will look at it.

Q. You gave it to the agent at Gentry?
A. Yes, sir.
Q. What did he do with it?
A. He said, "we don't make any delivery until we get the bill of lading for the goods."

Mr. McDonough: I object to what the agent said because the bill of lading is here: They have seen it; it is here, and therefore the conversations are not relavent.
Mr. Lindsey: Well, no.
Mr. McDonough: You don't insist on it then?
Mr. Lindsey: No, sir; I don't care about that.

Q. Well, when you turned over the bill of lading to the railroad company did you get all of your goods?
A. No, sir; never got but that one barrel.
Q. Did you afterwards get any portion of them?
A. About three months afterwards, I got a box.
Q. Since this bill of lading has been handed to us I see it says two boxes of household goods and one barrel of household goods. There is one then you say you never received?
Q. Yes, sir.
Q. Which one is it that you got about three months afterwards?
A. The small box.
12 Q. Did you ever get the larger box?
A. No, sir.
Q. What was in this larger box of goods?
A. Wearing apparel, two feather beds, bed spreads, two sets of dishes, chamber set, and several other articles.

Q. Was there any knives and forks?
A. Yes, sir.
Q. Any lamp?
A. Yes sir; one lamp.
Q. Any clock?
A. One clock.
Q. Any framed pictures?
A. Four or five framed pictures.
Q. Two feather beds?
A. Yes, sir.
Q. Do you know what those two feather beds and six quilts—Were they new or old quilts.
A. New; four had never been used.
Q. Three bed spreads—do you know what the three feather pillows, two sets of dishes, one large pitcher; one set of knives and forks, one lamp, one clock, and the five framed pictures were worth?

Mr. McDonough: That is objected to, your Honor, because the test is the market value, not his opinion of what they were worth.

Q. What would they reasonably be worth on the market at the town of Gentry, in October, 1907.
A. Well, I don't know what they would have been worth then, but last winter I would have given over a hundred dollars——

Mr. McDonough: I object.
13 The Court: That is not admissible.

Q. State what they were reasonably worth on the market at that time?
A. Well, they were worth, over, $75.00 anyhow.
Q. Now, there was other articles of clothing and some curtain poles, were in that box were they?
A. Yes, sir.
Q. What kind of clothing was this?
A. Couple of pair of pants and winter underwear; I can't just name all of them; couple of suits of underwear and some undershirts.
Q. Taking those articles of clothing, what were they worth?
A. I suppose they were worth about six dollars.
Q. What were those curtain poles worth?
A. Well, I suppose they were worth fifty or sixty cents.
Q. For the two pieces?
A. For the two brass poles.

Mr. Lindsey: You have no objection to the bill of lading being introduced without identifying it?
Mr. McDonough: You have introduced it.
Mr. Lindsey: Yes. I just want to read this part of it. (Reads bill of lading.)
(A copy of said bill of lading is hereto attached and marked Exhibit "A" to the testimony of J. M. Carl.)

Q. You paid the freight, did you there, to the agent?
14 A. I paid $3.85, and when I went to get the barrel they charged me extra.
Q. At Gentry?
A. Yes, sir.
Q. You paid all the freight at Lawton?
A. Yes, sir; all that was demanded.

Cross-examination J. M. Carl.

Cross-examination by Mr. McDONOUGH:

Q. That was just for the freight on the Choctaw was it not?
A. I paid it freight all the way through.
Q. The bill of lading just says, "paid to apply," doesn't say paid in full to the destination.
A. I told them I wanted them shipped to Gentry, and asked what the freight was, and they said $3.85.
Q. You understood you were paying to Gentry?
A. Yes sir.
Q. You didn't know that you were paying only for the Choctaw Rock Island?
A. I didn't know that. I supposed they were insuring them clear through.
Q. State if that is your signature to that paper?
A. This down here? Yes sir.
Q. I want to introduce it. You signed that at the same time the bill of lading was made out?
A. I just signed one copy. I don't know whether they had paper underneath or not.
Q. You didn't sign the bill of lading?
A. This is what was handed me.
15 Q. That was signed at the same time the bill of lading was delivered to you?
A. Yes, sir.

Mr. LINDSEY: Let it go in for whatever it is worth.
Mr. McDONOUGH: That is all I want it to go in for.
Mr. LINDSEY: Well, I mean it is not binding on him.
(Here Mr. McDonough read in evidence the contract referred to, and a copy whereof is hereto attached and marked Exhibit "B" to the testimony of J. M. Carl.)

Q. Did you weigh the two boxes of household goods?
A. No, sir.
Q. Did you know what they weighed?
A. No, sir. Going out they weighed 600 pounds.
Q. Well, the barrel and the two boxes are shipped at 400 pounds?
A. Yes, sir.
Q. Is that about what they weighed?
A. Yes, sir.
Q. Is that what they weighed?
A. That is what the agent guessed them at.

Q. You accepted it?
A. Yes, sir.
Q. You made no objection to that?
A. No, sir.
Q. You made no objection at this end of the line it was overweighed?
16 A. No, sir.
Q. You didn't ask to pay more on account of it being underweighed?
A. No, sir; because I didn't get my goods. I didn't see how they could demand extra freight charges and I didn't get the goods.
Q. You didn't tell the agent it weighed more than 400 pounds and you wanted to pay the freight on it?
A. No, sir; but, he weighed them when they come. The large box is to come yet.
Q. What agent?
A. Mr. Adams.
Q. Where?
A. At Gentry.
Q. Do you know what they weighed, the ones that you got?
A. No, sir; I don't know; they claimed they weighed 200 pounds; I did not see them weighed.

Redirect Examination of J. M. Carl.

Redirect examination by Mr. LINDSEY:

Q. Mr. Carl, did you receive a letter from the general freight agent at Kansas City, Missouri?
A. Yes, sir; I received several (producing a letter).

Mr. McDONOUGH: I want to object to them, your Honor, because they are incompetent and irrelevant. Just submit them to the court.
(Objection sustained by the court.)

Q. I will ask you, Mr. Carl, at the time you signed this contract of the Chicago, Rock Island & Pacific Ry. here, which states it is
17 released to $5 per 100 lbs. state whether or not you knew that was in it, and what was said between you?
A. I supposed the bill of lading showed——

Mr. McDONOUGH: I want to object to that.
They have introduced the bill of lading and we have introduced the contract that was executed at the same time. Here is the contract; he signed it; he says he signed it; it is in print——
(To the Witness): You can read, can you?
The WITNESS: Do you suppose a man in a hurry is going to take an hour to read that?
Mr. McDONOUGH: I object——
Mr. LINDSEY: I will withdraw the question.
Mr. McDONOUGH: When he signed this contract the two are one. There is nothing in the record here, nothing in the pleadings that can authorize him to explain why he signed this contract.

Mr. McGILL: This is an account filed in the Justice Court, where the account is filed; no pleading is required.

The COURT: I have ruled on a matter of that kind before and I permitted them to explain if they understood the contract. I think he may explain it.

Mr. McDONOUGH: Note our exception.

Q. At the time you signed the contract did you understand you were releasing your household goods to $5 per hundred-weight?

Mr. McDONOUGH: That is objected to as leading.

Q. I will ask you this question——

Mr. McDONOUGH: It is understood that all that character of testimony is objected to and we save an exception.

18 Q. State what was said between you and the agent at the time you signed this contract?

A. Nothing, only he just said, "Sign this bill of lading," and I signed it, and he handed me this, and I turned and took it and walked out.

Q. Did you know at the time you signed it that you were releasing your household goods to $5 a 100 lbs.

A. No, sir.

Mr. McDONOUGH: We except.

Q. Would you have signed it if you had?

A. No sir.

Q. Did you know anything about what rates the railroad had?

A. I don't know anything about the rate at all. They might have charged me double rate and it would have been all the same with me. All I was after was to get my goods here.

Q. And paid freight what they asked you?

A. Yes, sir; and then paid extra freight after I got here.

Q. Did you know what this was when you signed this?

A. No, sir. Never looked over it until I got it to the agent here. I just supposed it was to show I had goods coming.

Q. When did you first learn this O. R. $5 cwt., releasing it to $5 per hundred weight?

A. I got a letter from the claim agent, Church.

Mr. McDONOUGH: That is objected to unless they introduce the letter.

Q. How long after you arrived here?

A. That was after I put in my claim, three or four months after I shipped my goods.

Q. And after you arrived at Gentry?

19 A. Yes, sir. Kept writing to them telling them I didn't receive my goods and I thought it was time for him to look them up. He kept telling me he would see about it act once.

Q. Did the agent tell you why he wanted you to sign this?

A. No, sir; there wasn't anything said at all. I didn't ask him what it was.

Q. Did he tell you anything about wanting you to sign this on account of the freight rates?

A. No, sir.

Q. Did he tell you anything about two freights?

A. No, sir.

Q. Did you know anything about two freights?

A. No sir.

Q. Never heard about it until after you came here in Arkansas?

A. Yes, sir.

Q. And after the goods were lost?

A. Yes, sir; the goods getting such little value, Church telling me what I had sent.

Q. If you had known of the freights there at the time you signed it would you have sent it releasing it to $5 per cwt. or the higher rate?

A. No, sir. I would have sent it by express instead of monkeying with the freight company.

Recross-examination of J. M. Carl.

Recross-examination by Mr. McDonough:

Q. You would have sent them by express?

A. Yes, sir.

Q. And paid the higher rate?

A. Yes, sir. A fellow can afford it.

Q. By paying the higher rate you can afford to have goods shipped like this; that is the reason for it?

A. Yes, sir.

Q. You get better service by paying the higher rate?

A. Yes, sir.

Q. And you would have rather paid the higher rate?

A. Of course, it would have cost me more by express, but I didn't know there was two different rates in freight.

Q. You knew there was? You never shipped any household goods before?

A. No, sir.

Q. Had you shipped them over there?

A. My wife and brother shipped them over there. I was over there when they were shipped.

Q. There is wrote on this bill of lading which was read by Mr. Lindsey "O. R. $5 cwt., you didn't know what that meant?

A. No, sir.

Q. Didn't ask anyone?

A. No, sir.

Q. You didn't know that meant "Owners release $5 per hundred weight"?

A. Didn't know anything about it.

Q. That was on your paper that you took away with you?

A. If it is on now, it was on then.

Q. Well, it is there?

A. Yes, sir; But I didn't see it. I thought it would insure me that I shipped those goods there.

21 Q. Then you signed this contract without reading it at all, the contract that you said you signed?

A. I signed my name once.

Q. You didn't read it?

A. No, sir.

Q. You had an opportunity to read it?

A. I suppose so if I had taken time.

Q. You didn't do it?

A. No, sir. Not one person in a thousand that would.

Mr. McDONOUGH: I move the court to exclude that. That is an argument.

The COURT: Yes, sir; that is an argument.

You need not consider that statement.

Q. What was the name of the agent there?

A. I didn't know him.

Q. You don't know whether he is here now or not?

A. The agent at Gentry?

Q. No, sir; the agent at Lawton.

A. No, sir. I don't know him at all; I wouldn't know him if I would see him.

Q. Lawton, the place where you delivered the goods to the Rock Island is in the State of Oklahoma, or the Indian Territory then?

A. It was in Comanche County.

Q. It was in the Indian Territory then?

A. No, sir; Oklahoma.

Q. Oklahoma Territory?

A. I don't know whether it is Territory or not; in Comanche County, in the State.

Q. They made a state on November 16th last.

22 A. It is included with the Territory here.

Q. You mean it had its own government before that?

A. Yes, sir.

Q. But, anyway, it was from the State of Oklahoma to the State of Arkansas?

A. Yes, sir.

Redirect Examination of J. M. Carl.

Redirect examination by Mr. McGILL:

Q. If you had known there were two freight rates and another one higher than the one which you paid but which would have given you the full value of your goods in case of loss, would you have paid that rather than paid the lower rate?

Mr. McDONOUGH: That is objected to as incompetent, irrelevant and immaterial.

The COURT: I will permit him to state.

Mr. McDONOUGH: We save an exception.

A. Why, sure I would have taken the best rates, in order to secure my goods in case they should be lost, but I supposed there was but one rate on household goods.

Q. Now, these letters here, "O. R. Val. 5.00 Cwt.," you say you didn't notice that?

A. No, sir; I didn't know it was on there until the claim agent called my attention to it.

Q. And at the time he delivered it to you he didn't call your attention to it and explain it to you?

A. No, sir.

Q. And likewise he didn't call your attention and ask you to read this instrument you signed?

23 A. No, sir; nothing said at all.

Q. He just told you to sign it and you signed it and he handed this to you?

A. Yes, sir.

And further witness saith not.

24 EXHIBIT A.

Bill of Lading.

Exhibit "A" to the Testimony of J. M. Carl.

LAWTON, 10-8-1907.

Received from J. M. Carl, in apparent good order, by the Chicago, Rock Island & Pacific Railway Company the following described packages marked and numbered as per margin, subject to the conditions and regulations of the published tariff of said Company, to be transported over the line of this railroad to —— and delivered, after payment of Freight, in like good order to the next carrier (if the same are to be forwarded beyond the line of this Company's road), to be carried to the place of destination; it being especially agreed that the responsibility of this company shall cease at this company's depot at which the same are to be delivered to such carrier; but this Company guarantees that the rates of Freight for the transportation of said packages from the place of shipment to —— shall not exceed — per — and charges advanced by this Company, subject to the following conditions:

This Company shall not be responsible for the loss of packages the contents of which are unknown; for leakage of any kind of Liquids, breakage of any kind of glass, Carboys of Acid, or articles packed in Glass; Stoves or stove furniture, Castings, Machinery, Carriages, Furniture, Musical Instruments of any kind, Packages of Eggs, or for loss or damage on hay, Hemp, Cotton, or any articles whose bulk renders it necessary to transport in open cars; or for damages to personal property of any kind occasioned by delays from any cause, or change of weather; nor for any loss of weight of Grain, or Coffee in Bags, or Rice in Tierces, nor for loss of Nuts in Bags, or Lemons or Oranges in boxes not covered by canvas; or for damage or loss by

Fire, or for loss or damage on the Lakes or Rivers, unless it can be shown that such damage or loss occurred through the negligence or default of the Agents of the Company. It is further especially agreed that for all loss or damage occurring in the transit of said packages the legal remedy shall be against the particular carrier or forwarder only in whose custody may be actually at the happening thereof, it being understood that the Chicago, Rock Island & Pacific Railway Company assumes no other responsibility for their safe carriage or safety than may be incurred on its own road.

All car-load freight shall be subject to a minimum charge for trackage and rental of $1.00 per car for each 24 hours' detention or fractional part thereof, after the expiration of 48 hours from its arrival at destination.

All packages subject to charges for cooperage if necessary.

Consignee:	Destination:
J. M. Carl.	Gentry, Ark.

Description of Articles.

No.	Weights. Subject to correction.	Stamp.
2 Bx. H. H. Goods 1 Brl. H. H. Goods O. R. Val. 5.00 cwt.	400 127016	Paid to apply $3.85

R. F. PRETTYMAN, *Agent.*

25 EXHIBIT B.

Shipper's Release to $5.00 Cwt.

Exhibit "B" to the Testimony of J. M. Carl.

Chicago, Rock Island & Pacific Ry.

LAWTON STATION, 10, 8, 1907.

In consideration of the price (special Rates on Carloads and first class rates on less quantities) at which the Chicago, Rock Island & Pacific Railway Company hereby agrees to transport a quantity of household goods, furniture or emigrants' moveables (including live stock, if any in the car), from Lawton, O. T. Station to Gentry, Ark. Station, the same being consigned to J. M. Carl, I —— —— the Consignor, hereby release the said Company, and all other Railroad and Transportation Companies, over whose lines the above property may

pass to destination, from all liability from any loss or damage said property may sustain in excess of $5.00 per 100 lbs., and I hereby guarantee all charges for freight on connection lines to destination.

J. M. CARL, *Consignor.*

N. B.—When household goods, etc., are shipped at rate based on valuation of $5.00 per hundred pounds, agents will require the owner or consignor to sign this agreement, and when signed same must be kept on file at forwarding station. Agent must then note on Way-Bill "Released to valuation of $5.00 per hundred pounds.

26 This was all the testimony introduced on behalf of the plaintiff.

27 *Deposition of H. A. Weaver.*

And thereupon, the defendant, to sustain the issues upon it part, introduced the following testimony, to wit:

The deposition of H. A. Weaver, which is in words and figures as follows, to wit:—

(Caption and Certificate Omitted.)

H. A. WEAVER, being first duly sworn, deposes and says:—

1. State whether or not you held any position with the Kansas City Southern Railroad Company.

For answer to the first interrogatory witness states:

Yes, I am employed by the Kansas City Southern Railway Company, as assistant general freight agent.

2. If you answer that you are the Assistant General Freight Agent, then state whether or not you are familiar with the rates for the shipment of household goods that were in existence on the 8th day of October, 1907, between Lawton, now in the State of Oklahoma, and then in the Indian Territory, over the Chicago, Rock Island & Pacific Railway from said Lawton via Howe, then in the Indian Territory, to Gentry in the State of Arkansas?

For answer to the second interrogatory the witness states:

I am familiar with the rates in effect on household goods October 8th, 1907, between Lawton, then in the Indian Territory, and Gentry, in the State of Arkansas.

3. If you are familiar that you are familiar with the rates that were then in existence and that they had been duly filed with the United States Interstate Commerce Commission, please state whether or not there were in existence at that time two rates upon household goods?

For answer to the third interrogatory witness says:

There were two rates on household goods in existence, one based upon a released valuation of $5.00 per hundred pounds, the other a higher rate on shipments not so released, which rates Howe to Gentry were evidenced by tariffs duly filed with the Interstate

28 Commerce Commission and published according to law.

4. If you answer that there were two rates upon household goods, state what those rates were?

For answer to the Fourth Interrogatory witness states:

The rate according to the tariff of the Kansas City Southern Railway Company, their No. 822 A from Howe, Indian Territory, to Gentry, Arkansas, on October 8th, 1907, on shipments of household goods released to $5.00 per hundred pounds valuation was 72 cents per hundred pounds; on shipments not so released, the rate was $1.08 per hundred pounds.

According to the tariff of the Chicago, Rock Island and Pacific Railway Company, their No. GFD 12100-D, amendment No. 25, the rate from Lawton, Indian Territory, to Howe, Indian Territory, on shipments as above, was 84 cents per hundred pounds; when not so released $1.26 per hundred pounds.

5. If you have stated what the rates were, then state whether or not a shipper of household goods on the 8th day of October, 1907, from said Lawton to Gentry, Arkansas, via Howe received a lower rate of freight by releasing the goods to a valuation of $5.00 per cwt.; and if you state that he would get a lower rate on account of such a contract with the Company, state how much lower the rate would be giving the rate on household goods without such release and the rate on household goods with such release?

For answer to the Fifth Interrogatory Witness states:

A shipper by releasing his household goods to a valuation of $5.00 per hundred pounds would receive a lower rate than if shipment was not so released, the difference in the two rates being 78
29 cents per hundred pounds from Lawton to Gentry.

H. A. WEAVER.

And this was all the testimony introduced on behalf of the defendant.

30 *Testimony of J. M. Carl in Rebuttal.*

And thereupon the plaintiff, to further maintain the issues on his part joined, introduced the following testimony in rebuttal, to wit:—

J. M. CARL, the plaintiff, being recalled in rebuttal, testified further as follows, to wit:—

Direct Examination.

Direct examination by Mr. MCGILL:

Question. Did you notify the agent of the Kansas City Southern Railway Co. about your loss?

Answer. Which, the claim agent?

Q. Yes, sir.

A. Why, yes; sir; I notified him.

Q. Did you notify the agent at——

A. Yes, sir.

Q. What claim agent did you notify?

A. M. E. George.

Q. At what place?
A. Kansas City.
Q. Is he the freight claim agent?
A. Claims to be, addresses himself that way.
Mr. McDONOUGH: The letters were in writing?
The WITNESS: Yes, sir.
The COURT: You will have to produce the letters.
Q. You haven't the letters you wrote to the claim agent?
A. No, sir. I suppose he had got them.
Q. You got the replies?

—. ——.

31 Q. Do you know what time you notified him?
A. Some time this last Spring the first time.
Q. You wrote notifying him and put in a claim?
A. I turned in the claim to the agent at Gentry.
Q. That was about how long before you brought suit?
A. I suppose about five months, I guess, before I brought the suit.

And further witness saith not. * * *

And this was all the testimony introduced by either party on the trial of this cause.

32 *Peremptory Instructions Asked by Defendant.*

And thereupon at the conclusion of said evidence, the defendant moved the court to peremptorily instruct the jury to return a verdict in favor of the defendant, which said motion was by the court overruled, and the defendant at the time excepted.

Thereupon the defendant requested the court to instruct the jury to find a verdict for the plaintiff in the sum of ten dollars, which said motion was by the court overruled, and the defendant at the time excepted.

The defendant thereupon requested the court to instruct the jury as follows:—

Instructions Asked by Defendant.

I.

The contract releasing the value of the goods shipped to $5 per 100 pounds was a legal and binding contract and when entered into by the parties both are bound by it, and in case of loss of the goods the plaintiff, if his goods were lost, can only recover $5 for each 100 pounds so lost.

II.

If the plaintiff signed the contract without reading it, he is bound by its terms.

III.

If the plaintiff by signing the contract releasing the value of his goods to $5 per 100 pounds received a lower rate than he would have

received without signing such contract, then said contract is binding, and the plaintiff could only recover on said basis.

33 IV.

It would be a violation of the Interstate Commerce law for the initial carrier or the defendant to give the plaintiff the benefit of the lower rate and then give him the benefit of the full liability in case of loss; such acts would be a violation of the Interstate Commerce Law of the United States.

V.

Under the Interstate Commerce Law of the United States, the contract introduced in evidence is valid and binding, and the plaintiff can only recover if his goods are lost $5 per 100 pounds on the goods lost.

The court refused to give each and every one of said instructions and the defendant at the time saved a separate and several exception to the action of the court in refusing to give each and every one of said instructions, the said exceptions being separately and severally saved with reference to each and every one of said instructions.

34 *Instructions of the Court.*

And thereupon the court instructed the jury as follows:—

I.

If you find that plaintiff's goods were lost in transit, the presumption would be that the same were lost through the negligence of the defendant company, in the absence of any evidence to the contrary.

II.

If you find the plaintiff's goods were lost through the negligence of the defendant company, he would be entitled to recover the market value of the goods lost less the amount of freight that would have been due on the same, unless you find that the plaintiff made a valid contract limiting the amount to be recovered in case of loss, in which case he would only be entitled to recover the amount provided for in such contract.

III.

If you find from the evidence that the plaintiff at the time of shipping his goods signed a contract limiting the amount of his recovery in case of loss, he would be bound by such contract, if the
35 same was entered into by him fairly and without any fraud or concealment on the part of the railroad company.

VI.

If you find from a preponderance of the evidence that plaintiff was induced to enter into such contract by unfair means and by

fraudulent concealment on the part of the agent of the railroad company which received the goods for shipment of the fact that there were two freight rates for such goods and of the fact that such contract was for the purpose of limiting the amount of loss, and that such agent did not explain to plaintiff the purpose of such contract and knew at the time that plaintiff signed the same without reading it or having it read, and you further find that the plaintiff did not in fact know the contents of such contract or understand its purpose when he signed it, but signed it in good faith, believing that it was merely for the purpose of showing that his goods had been received by the company for shipment, he would not be bound by the contract.

VII.

36 If you find from the evidence that there were two freight rates in existence at the time plaintiff's goods were shipped and that the railroad agent merely offered the plaintiff one rate, without informing him of the fact that he had the right to pay a higher rate without limiting the amount of recovery in case of loss and that plaintiff had no knowledge or information of that fact, he would not be bound by the contract signed by him, unless you find from the evidence that the railroad company actually used the two rates in shipment of household goods and in good faith offered plaintiff the choice of the two rates and obtained his signature to the contract without any fraud or concealment or unfair means.

The defendant at the time objected to the action of the court in giving each and every one of said instructions, said objections being made separately and severally with reference to each instruction; the court overruled each and every objection to each of said instructions, and the defendant at the time saved a separate exception to the action of the court in giving each and every one of said instructions.

Thereupon, after hearing the instructions of the court and the argument of counsel, the jury retired to consider of their verdict and returned into court the following verdict, to wit:—

(Clerk will here copy verdict.)

Verdict.

"We, the jury find for the plaintiff, in the sum of $75.00.

W. T. MARRS, *Foreman.*"

37 *Motion for New Trial.*

And thereupon, on the same day, the defendant filed its motion for a new trial herein, which said motion for a new trial is in words and figures as follows, to wit:—

In the Circuit Court of Benton County, Arkansas.

J. M. CLARK, Plaintiff,
v.
KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Motion for New Trial.

"Comes the defendant and moves the court for a new trial herein, upon the following grounds, to wit:—

1. The verdict is not supported by any evidence whatever.
2. The verdict is contrary to the law and the evidence.
3. The court erred in giving instruction No. 1.
4. The court erred in giving instruction No. 2.
5. The court erred in giving instruction No. 3.
6. The court erred in giving each and every one of the above instructions Nos. 1, 2 and 3, which instructions were given at the request of the plaintiff.
7. The court erred in refusing to instruct the jury to find the issues for the defendant.
8. The court erred in refusing to instruct the jury to find for the plaintiff in the sum of ten dollars.
9. The court erred in refusing defendant's instruction No. 1.
10. The court erred in refusing to give defendant's instruction No. 2.
11. The court erred in refusing to give defendant's instruction No. 3.
12. The court erred in refusing to give defendant's instruction No. 4.

38 13. The court erred in refusing to give defendant's instruction No. 5.

14. The court erred in permitting the plaintiff J. M. Carl, to testify that he did not know at the time he signed the contract introduced in evidence that he was releasing the value of his goods down to five dollars per hundred weight.
15. The court erred in permitting the plaintiff to testify that if he had known there were two freights and one was higher than the other that he would have made the full value of his goods in case the goods were lost he would have paid the higher rate rather than the lower rate.

The premises considered, the defendant prays that the verdict herein be set aside and that it be granted a new trial.

READ & McDONOUGH,
Attorneys for Defendant.

Motion—New Trial Ordered—Appeal.

And on the same day the court overruled said motion for a new trial, and to which action of the court in overruling said motion for a new trial the defendant at the time excepted, and prayed an appeal to the supreme court, which was granted; and the defendant asked

the court to allow it sixty days in which to prepare and file its bill of exceptions, which was granted.

And now comes the defendant, within the time allowed by the court, and presents this its bill of exceptions and prays that the same may be signed, sealed and made a part of the record herein, which is accordingly done. November 7, 1908.

J. S. MAPLES,
Judge of the Fourth Judicial District of Arkansas.

Filed Nov. 12, 1908.
W. T. MAXWELL, *Clerk.*

39 *Certificate.*

STATE OF ARKANSAS,
County of Benton:

I, W. T. Maxwell, do certify that I am the duly elected, qualified, commissioned and acting Circuit Clerk within and for the County and State aforesaid; That the above and foregoing sheets contain an abstract of the proceedings in the J. P. Court, in the cause herein, all the pleadings and record on file and of record in this office.

Witness my hand and seal as such Circuit Clerk, this 24th day of December, 1908.

[SEAL.]

W. T. MAXWELL,
Circuit Clerk.

40 No. 664. Kansas City Southern Ry. Co. v. J. M. Carl. Benton. J. S. Maples, J. Transcript. Filed Dec. 29, 1908. P. D. English, Clerk. By J. H. Campbell, D. C. (Bank of Transcript.)

41 *Supreme Court Proceedings.*

STATE OF ARKANSAS,
In the Supreme Court, set:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 24th day, being the fourth Monday of May, A. D. 1909, at the Courthouse, in the City of Little Rock, the following proceedings were had, to wit: On the 7th day of June, 1909, a day of said term:

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,
vs.
J. M. CARL, Appellee.

Appeal from Benton Circuit Court.

Submission of Cause.

Causes Submitted.

The following causes being regularly called, come the parties thereto by their attorneys and solicitors and said causes are sub-

mitted upon the transcripts of the records and the briefs filed and are by the Court severally taken under advisement, viz:

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664.

KANSAS CITY SOUTHERN RAILWAY COMPANY
v.
J. M. CARL.

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42 *Judgment.*

On June 14th, 1909.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,
vs.
J. M. CARL, Appellee.

Appeal from Benton Circuit Court.

This cause came on to be heard upon the transcript of the record of the circuit court of Benton County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all his costs in this court in this cause expended and have execution thereof.

43 *Petition for Rehearing Filed.*

On June 28th, 1909.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,
vs.
J. M. CARL, Appellee.

Appeal from Benton Circuit Court.

Comes the appellant by attorneys and files a petition for re-hearing and requests time in which to file briefs in support of same. Said petition is therefore passed until the first day of the fall session for submission, and said appellant is allowed four weeks' time from this date in which to file such briefs.

Time Granted.

On September 27th, 1909.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,
vs.
J. M. CARL, Appellee.

Appeal from Benton Circuit Court.

On motion the appellee is granted two weeks' time from this date in which to file a brief on the petition for re-hearing filed herein.

Petition Submitted.

On October 11th, 1909.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,
vs.
J. M. CARL, Appellee.

Petitions for Re-hearing Submitted.

The following causes being called on petitions for re-hearing filed therein, are submitteed on said petitions, responses
44 thereto and the briefs filed, and are by the Court severally taken under advisement, viz.:

KANSAS CITY SOUTHERN RAILWAY COMPANY
v.
J. M. CARL.

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Petition for Rehearing Denied.

On October 25th, 1909.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,
vs.
J. M. CARL, Appellee.

Appeal from Benton Circuit Court.

Being fully advised, the petition for re-hearing filed herein is by the Court denied.

45 *Opinion Supreme Court.*

In the Supreme Court of Arkansas, June 14, 1909.

K. C. So. RY. CO.
v.
CARL.

Statement by the Court.

This is an action to recover damages for loss of a box of household goods shipped from Lawton, Oklahoma, to Gentry, Arkansas. The suit was brought before a justice of the peace in Benton county, Arkansas, and judgment was rendered in favor of the plaintiff. The case was duly appealed to the Benton circuit court. On a trial anew in that court, the plaintiff testified that on October 8th, 1907, he delivered to the Chicago, Rock Island & Pacific Railway Company at Lawton, Oklahoma two boxes and one barrel, containing household goods, and that he signed a contract and received a bill of lading. The goods were consigned to himself at Gentry, Arkansas. He received the barrel of goods, and also one of the boxes; but one of the boxes was never received. The value of the goods as testified to by the plaintiff exceeded the sum of $75.00.

The defense of the railway company was that the goods were shipped upon a contract between the plaintiff and the Chicago, Rock Island & Pacific Railway Company and its connecting carriers. That the defendant is one of the connecting carriers and is entitled to the benefit of all the provisions of said contract. That said contract contained a stipulation that in consideration that the plaintiff would receive the lower of two freight rates, in case of loss, said goods should be valued at $5.00 per cwt. That all of the goods received weighed 400 pounds. That there was delivered to the plaintiff by the defendant 300 pounds of said goods.

The jury returned a verdict for plaintiff for $75.00, and the defendant has appealed from the judgment rendered.

46 *Opinion.*

HART, J. (after stating the facts):

Counsel for appellant urge that upon the undisputed evidence the court should have directed a verdict for appellant.

They rely for a reversal on the clause in the contract with the initial carrier limiting the liability as to value in case of loss. They contend that the stipulations restricting the liability in case of loss were made for their benefit as well as for the benefit of the initial carrier, and base their contention on our decisions to that effect in the cases of St. L. I. M. & So. Ry. Co. v. Weakley, 50 Ark. 406; St. L. & S. F. Ry. Co. v. Burgin, 83 Ark. 502, and cases cited.

But in making their contention, they have not taken into consideration the effect of the Hepburn Amendment to the Inter State Commerce Act, which became effective on June 29th, 1906, a date prior to the time the contract in question was made.

That part of the Hepburn Act which applies to the present case is contained in section 20, which reads as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained the
47 amount of such loss, damage, or injury as it may be required to pay the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

The undisputed evidence shows that the initial carrier received the property for transportation from a point in one State to a point in another State, and the presumption in the absence of evidence to the contrary was, as will be seen from our decisions hereinafter referred to, that the goods were lost through the negligence of appellant, the last carrier.

The section of the Hepburn Act above quoted makes the carrier liable "for any loss, damage, or injury to such property caused by it * * * and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

The express terms of the act makes the carrier liable for any loss

caused by it, and provides that no contract shall exempt it from the liability imposed. It is manifest that the act renders invalid all stipulations designed to limit liability for losses caused by the carrier. Public policy forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. For the same reason a statute may prohibit it from making stipulations in a contract which provide for such partial exemption.

If the initial carrier is prohibited from making a contract limiting its own liability, it is obvious that it could not make a contract limiting the liability of its connecting carriers; for the section of the Hepburn Act under discussion provides that the carrier issuing the bill of lading may recover from the connecting carrier, on whose line the loss occurs the amount of the loss it may be required to pay the owner.

"The act expressly invalidates all stipulations designed to limit liability for losses caused by the carrier." In the matter of Released Rates, 13 Interstate Commerce Reports, 550.

In the case of St. Louis Southwestern R. Co. v. Grayson &
48 Seitz, 115 S. W. 933, — Ark. L. Rep. —, we held that a restriction of the liability of a carrier to loss upon its own line is violation of the Hepburn Act, making the initial carrier liable for damage to an interstate shipment whether it occurs on its own line or on its connecting lines, and in support of the decision cited the case of Smeltzer v. St. Louis & San Frisco R. Co. 158 Fed. 649. The validity of this clause of the Hepburn Act has also been sustained by the Court of Appeals of the State of Georgia in the case of Southern Pacific Company v. Crenshaw Brothers, ms. op.

Therefore, we hold that the contract in question was prohibited by the terms of the Hepburn Act and is invalid in so far as it attempts to limit the liability of the carrier in case of loss caused by it.

This case is distinguished from the case of St. L. I. M & S. Ry. Co. v. Furlow, 16 Ark. L. R. 436 and St. Louis and San Frisco Rd. Co. v. Keller, ms. opinion, where we held that a stipulation in a contract for an interstate shipment which required notice in writing of the loss to be given within a specified time, if reasonable, was not in conflict with the provisions of the Hepburn Act. The stipulation in question there did not exempt the carrier from any liability imposed by the Hepburn Act. They were mostly rules or regulations adopted by the carrier for the purpose of securing it from fraud and imposition.

Having held the contract of shipment invalid in so far as it restricted the liability of the carrier as to the value of the goods shipped, in case of loss, because such restriction was in violation of the provisions of the Hepburn Act, the case stands as if the Chicago, Rock Island & Pacific Railroad Company had accepted the goods for shipment from Lawton, Oklahoma to Gentry, Arkansas, and the appellant was the last carrier of the goods.

"Where goods are shipped over connecting lines of carriers on a through bill of lading, and on reaching their destination a box is missing, in an action therefor against the last carrier the burden of

proof is on it to show that the loss did not occur on its line."
49 St. L. S. W. Ry. Co. v. Birdwell, 72 Ark. 502. To the same effect see K. C. So. Ry. Co. v. Embry, 76 Ark. 589; Midland Valley Rd. Co. v. Hale, 86 Ark. 483.

In this case the undisputed evidence shows that the goods were delivered to the initial carrier, and there is nothing to rebut the presumption that they were received by appellant, the last carrier, and lost through its negligence.

Hence under the undisputed evidence as disclosed by the record, appellant was liable for the amount recovered.

The judgment being right upon the undisputed testimony, no prejudice could have resulted to applicant from any instruction given by the court. St. L. S. W. Ry. Co. v. Grayson & Seitz, supra.

Therefore it will not be necessary to discuss the correctness of the instructions given by the court and the judgment will stand affirmed.

50 *Clerk's Certificate to Transcript.*

STATE OF ARKANSAS,
In the Supreme Court:

I, P. D. English, Clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the Kansas City Southern Railway Company, appellant vs. J. M. Carl, appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 6 day of January, 1910.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court, Arkansas.

51 *Assignments of Error and Prayer for Reversal.*

In the Supreme Court of the State of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
J. M. CARL, Defendant in Error.

Assignments of Error and Prayer for Reversal.

Now comes the plaintiff in error above named and respectfully submits that in the record proceedings, decision and final judgment in the Supreme Court of the State of Arkansas in the above entitled matter there is manifest error in this, to-wit:

1. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it

by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven," and all acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act, by refusing to hold that the Benton County Circuit Court in the trial of this cause committed error in refusing to instruct the jury to render a verdict in favor of the plaintiff in error.

2. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Inter-
52 state Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and all acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to hold that the Benton County Circuit Court in the trial of this cause committed error in refusing to give the following instruction which was plaintiff in error's instruction #1, to-wit:

"The contract releasing the value of the goods shipped to $5.00 per 100 pounds was a legal and binding contract and when entered into by the parties both are bound by it, and in case of loss of the goods the plaintiff, if his goods were lost, can only recover $5.00 for each 100 pounds so lost."

3. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and all acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to hold that the Benton County Circuit Court in the trial of this cause committed error in refusing to give the following instruction which was plaintiff in error's instruction #2, to-wit:

"If the plaintiff signed the contract without reading it, he is bound by its terms."

4. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts

amendatory thereof, commonly known together as the Inter-
53 state Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and all acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to hold that the Benton County Circuit Court in the trial of this cause committed error in refusing to give the following instruction which was plaintiff in error's instruction #3, to-wit:

"If the plaintiff by signing the contract, releasing the value of his goods to $5.00 per 100 pounds, received a lower rate than he would have received without signing such contract, then said contract is binding, and the plaintiff could only recover on said basis."

5. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to hold that the Benton County Circuit Court in the trial of this cause committed error in refusing to give the following instruction which was plaintiff in error's instruction #4, to-wit:

"It would be a violation of the Interstate Commerce Law for the initial carrier the defendant to give the plaintiff the benefit of the lower rate and then give him the benefit of the full liability in case of loss; such acts would be a violation of the Interstate Commerce Law of the United States."

6. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by
a proper construction of the Act of Congress entitled "An Act
54 to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to hold that the Benton County Circuit Court in the trial of this cause committed error in refusing to give the following instruction which was plaintiff in error's instruction #5, to-wit:

"Under the Interstate Commerce Law of the United States, the contract introduced in evidence is valid and binding, and the plaintiff can only recover, if his goods are lost, $5.00 per 100 pounds on the goods lost."

7. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to hold that the Benton County Circuit Court committed error in the trial of this cause by granting the following instruction which was instruction #2 offered by the defendant in error, to-wit:

"If you find the plaintiff's goods were lost through the negligence of the defendant company, he would be entitled to recover the market value of the goods lost less the amount of freight that would have been due on the same, unless you find that the plaintiff made a valid contract limiting the amount to be recovered in case of loss, in which case he would only be entitled to recover the amount provided for in such contract."

8. Because the Supreme Court of the State of Arkansas
55 denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to hold that the Benton County Circuit Court committed error in the trial of this cause by granting the following instruction which was instruction #3 offered by the defendant in error, to-wit:

"If you find from the evidence that the plaintiff at the time of shipping his goods signed a contract limiting the amount of his recovery in case of loss, he would be bound by such contract, if the same was entered into by him fairly and without any fraud or concealment on the part of the railroad company."

9. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to hold that the Benton County Circuit

Court committed error in the trial of this cause by granting the following instruction which was instruction #4 offered by the defendant in error, to-wit:

"If you find from a preponderance of the evidence, that plaintiff was induced to enter into such contract by unfair means and
56 by fraudulent concealment on the part of the agent of the railroad company which received the goods for shipment, of the fact that there were two freight rates for such goods and of the fact that such contract was for the purpose of limiting the amount of loss, and that such agent did not explain to plaintiff the purpose of such contract and knew at the time that plaintiff signed the same without reading it or having it read, and you further find that the plaintiff did not in fact know the contents of such contract or understand its purpose when he signed it, but signed it in good faith, believing that it was merely for the purpose of showing that his goods had been received by the company for shipment, he would not be bound by the contract."

10. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to hold that the Benton County Circuit Court committed error in the trial of this cause by granting the following instruction which was instruction #5 offered by the defendant in error, to-wit:

"If you find from the evidence, that there were two freight rates in existence at the time plaintiff's goods were shipped and that the railroad agent merely offered the plaintiff one rate, without informing him of the fact that he had the right to pay a higher rate without limiting the amount of recovery in case of loss, and that plaintiff had no knowledge or information of that fact, he would not be bound by the contract signed by him, unless you find from the evidence that the railroad company actually used the two rates in shipment of household goods and in good faith offered plaintiff the choice of the two rates and obtained his signature to the contract without any fraud or concealment or unfair means."

11. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all
57 acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Inter-

state Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by holding that Section 20 of the Interstate Commerce Law as amended by the Hepburn Act prohibited the Chicago, Rock Island & Pacific Railway Company from making, for the benefit of itself and plaintiff in error as a connecting carrier, a contract of shipment whereby the valuation of the goods shipped should be released to the sum of Five Dollars ($5.00) in consideration of the carriage of said goods at the lower of two rates of freight applicable to the commodity shipped where both of said rates were duly published and filed in accordance with the provisions of the Interstate Commerce Law and by such publication and filing the application of the said lower rates was made conditional upon the said released valuation by the shipper; whereas in truth and in fact under a proper construction of said Acts of Congress such contracts may be made and when made are enforceable.

12. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by holding that Section 20 of the Interstate Commerce Law as amended by the Hepburn Act imposes upon a connecting carrier a liability to the lawful holders of bills of lading for any loss, damage or injury caused by it to property carried there-
58 under and forbids such connecting carrier from exempting itself from such liability by any contract, receipt, rule or regulation; whereas in truth and in fact said Section 20 imposes no liability whatever upon any connecting carrier in favor of any shipper.

13. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by holding that Section 20 of the Interstate Commerce Law as amended by the Hepburn Act prohibits a carrier and prohibited plaintiff in error or its agent, the Chicago, Rock Island & Pacific Railway Company, from making stipulations in a contract with the shipper for partial exemption from liability for loss and damage to property shipped and invalidates all such stipulations when such stipulations are made in consideration of the application

of the lower of two rates applicable to the commodity in question, both of which are duly filed and published as required by the Interstate Commerce Law and where by such filing and publication the making of such stipulation is made a condition precedent to the application of the said lower rate.

14. Because the Supreme Court of the State of Arkansas denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts
59 amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by refusing to give effect to Section 6 of the Interstate Commerce Law as amended which provides that schedules showing all rates to be charged shall be filed as therein provided and that such schedules shall contain any rules or regulations which in any wise change, affect or determine any part or the aggregate of such rates, or the value of the service rendered to the shipper and further prohibits carriers subject to the Act, including the plaintiff in error, from charging, demanding, collecting or receiving a greater or less or different compensation for such transportation of persons or property or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariffs filed and in effect at the time or from extending to any shipper or person any privilege in the transportation of property except such as are specified in such tariffs by holding that although the goods of defendant in error who shipped at the less of two tariff rates applicable thereto, both of which were published and filed as required by said Acts and were so shipped at said less rate under the express provision of the said tariff that in such event the valuation of said goods should be released to Five Dollars ($5.00) per cwt. otherwise that the higher of the said two rates should apply and although the contract of shipment was made by the defendant in error with the plaintiff in error and its agent, the Chicago, Rock Island & Pacific Railway Company, in strict accordance with the provision of the said tariffs, nevertheless the plaintiff in error is liable to the defendant in error for the full value of all of such goods lost in transit.

15. Because the Supreme Court of the State of Arkansas in its said judgment and decision denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act
of Congress entitled "An Act to Regulate Commerce" approved
60 February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June

29th, 1906, and commonly known as the Hepburn Act by holding that when a common carrier had filed with the Interstate Commerce Commission, as required by the Interstate Commerce Law, and had published, as required by said law, two rates on household goods between points in different States, one rate to be given where there was no limitation upon the liability, and when the shipper had selected the lower rate, and had received the benefit of the lower rate, and when the goods had been lost, the said shipper could maintain an action to recover the full value without limitation of liability when he had not paid the rate allowing him full liability.

16. Because the Supreme Court of the State of Arkansas in its said judgment and decision denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by denying to the plaintiff in error the right to contract with the shipper for a released valuation of property in consideration of the lower of two rates where both of such rates were properly filed and published in accordance with the provision of the Interstate Commerce Law and the granting of such lower rate was made conditional upon the making of such released valuation.

17. Because the Supreme Court of the State of Arkansas
61 in its said judgment and decision denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by holding in effect that where a carrier has published and filed, as required by the Interstate Commerce Law, a higher and a lower rate for the transportation of house-hold goods and by such filing and publication has made the application of the lower rate conditional upon the execution by the shipper of a released valuation of the goods so to be shipped, the lower rate so filed, and notwithstanding such conditions, shall apply upon shipments of such goods made under full common law liability although no order has been made by the Interstate Commerce Commission setting aside the higher rates as unreasonable or otherwise contrary to the provisions of the Interstate Commerce Law and imposing on the carrier the duty of carrying all such commodities at the lower rate and without such restriction upon or exemption from the carrier's full common law liability.

18. Because the Supreme Court of the State of Arkansas in its said judgment and decision denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906,
62 and commonly known as the Hepburn Act by refusing to hold that the contract of shipment under which the goods of the defendant in error were transported was a good and valid contract under said Acts of Congress.

19. Because the Supreme Court of the State of Arkansas in its said judgment and decision denied to the plaintiff in error a right, privilege and immunity granted to it by a proper construction of the Act of Congress entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof, commonly known together as the Interstate Commerce Law and under an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred eighty-seven and acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission" approved June 29th, 1906, and commonly known as the Hepburn Act by holding that the burden of the proof was on the plaintiff in error as the last of connecting carriers delivering the shipment to show that the loss did not occur on its line.

Wherefore, plaintiff in error, The Kansas City Southern Railway Company, prays that the final decision of the Supreme Court of Arkansas in this cause be reversed by the Supreme Court of the United States and that this cause be dismissed on its merits or reversed and remanded for new trial.

FRED. H. WOOD,
SAMUEL W. MOORE,
JAS. F. READ,
JAMES B. McDONOUGH,
Attorneys for Plaintiff in Error.

Filed December 22, 1909. P. D. English, Clerk. By W. P. Sadler, D. C.

63 *Petition for Writ of Error.*

UNITED STATES OF AMERICA,
State of Arkansas:

To the Honorable Chief Justice of the Supreme Court of Arkansas:

The petition of The Kansas City Southern Railway Company respectfully shows that on the 25th day of October, 1909, the Supreme Court of the State of Arkansas returned a final judgment against

your petitioner in a certain case wherein J. M. Carl was plaintiff and your petitioner was defendant for the sum of Seventy-five Dollars ($75.00) and costs as will appear by reference to the records and proceedings in said cause; that said court is the highest court of said state in which a decision could be had and your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States because your petitioner claims that the said judgment and the decision of the said Supreme Court of Arkansas deprives your petitioner of a right, privilege and immunity under certain acts of Congress, to-wit: An Act entitled "An Act to Regulate Commerce" approved February 4th, 1887 and all acts amendatory thereof including an Act of Congress entitled "An Act to amend an Act entitled 'An Act to Regulate Commerce, approved February fourth, eighteen hundred eighty-seven' and all acts amendatory thereof," and to enlarge the power of the Interstate Commerce Commission" approved June 29th, 1906, in that your petitioner claims that it is not liable in the said cause or if liable is not liable to the amount for which said final judgment was rendered because by a proper construction of the said Acts your petitioner is entitled to the benefit of a certain contract or bill of lading made by the said plaintiff and the Chicago, Rock Island & Pacific Railway Company for the benefit of said Company and your petitioner
64 whereby the valuation of the goods shipped under said contract and for the loss of which said final judgment was rendered was released to Five Dollars ($5.00) in consideration of a lower or reduced rate of freight than would have applied if such release of valuation had not been made which said lower rate together with the conditions under which the same would be granted were duly filed with the Interstate Commerce Commission by your petitioner and the Chicago, Rock Island & Pacific Railway Company in accordance with the provisions of said Act of Congress thereby creating a right, privilege and immunity under a proper construction of the said Acts of Congress which was properly set up or claimed by your petitioner in the said cause; all of which appears by the record of the proceedings in said cause which is herewith submitted and your petitioner herewith offers proper supersedeas bond.

Wherefore, your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States and for citation and supersedeas, and your petitioner will ever pray. Assignment of errors herewith filed.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By READ AND McDONOUGH, *Att'ys.*
SAMUEL W. MOORE,
FRED. H. WOOD,
JAS. F. READ,
JAMES B. McDONOUGH,
Attorneys for Petitioner.

Allowance Writ of Error.

Let the Writ of Error issue as prayed.
December 22, A. D., 1909.

EDGAR A. McCULLOCH,
Chief Justice of the Supreme Court of the State of Arkansas, Now and at the Time of the Rendition of said Judgment.

Filed December 22d, 1909. P. D. English, Clerk. By W. P. Sadler, D. C.

65 *Bond.*

Copy.

UNITED STATES OF AMERICA:

Supersedeas Bond.

Know all men by these presents, That we, The Kansas City Southern Railway Company as Principal, and the United States Fidelity and Guaranty Company, as Surety, are held and firmly bound unto J. M. Carl in the amount of the judgment, costs, interest and damages as hereinafter provided:

Sealed with our seals and dated this 21 day of December, A. D. 1909.

The above bond is upon this express condition, to-wit:

Whereas, the plaintiff in error, The Kansas City Southern Railway Company, has taken a writ of error from the judgment of the Supreme Court of the State of Arkansas, rendered at the present term of said court and on the 25th day of October, 1909 in favor of the defendant in error for the sum of Seventy-five Dollars ($75.00) and interest and costs, and said judgment being rendered against the plaintiff in error, and

Whereas, the said Kansas City Southern Railway Company has prosecuted a writ of error and is prosecuting a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the Supreme Court of Arkansas in the above entitled cause, and

Whereas, The Kansas City Southern Railway Company desires to supersede the said judgment:

Now therefore, The above named Principal and Surety hereby covenant to and with the above named defendant in error, J. M. Carl, that the said The Kansas City Southern Railway Company will pay to the said defendant in error all costs and damages that may

66 be adjudged against the plaintiff in error and in the event of the failure of said plaintiff in error to prosecute its said writ of error to a final judgment in the Supreme Court of the United

States or if said writ shall for any cause be dismissed or if on the hearing of the said writ of error in the Supreme Court of the United States, the judgment of the Supreme Court of Arkansas shall be affirmed, then if the said The Kansas City Southern Railway Company shall fully pay said judgment and fully perform all the orders of the said Court, then this obligation shall be null and void, otherwise the same shall remain in full force and effect.

Witness our hands this 21 day of December, A. D., 1909.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By READ AND McDONOUGH *Its Attorneys.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By MILTON BOYD, *Its Attorneys in Fact.*

Approval of Bond.

Approved this 22 day of December, 1909.

EDGAR A. McCULLOCH,
Chief Justice Supreme Court of Arkansas, Now and at the Time of the Rendition of said Judgment.

Endorsed: Filed December 22, 1909. P. D. English, Clerk. By W. P. Sadler, D. C.

67 *Writ of Error and Allowance Thereof.*

Writ of Error.

UNITED STATES OF AMERICA, *sct:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court before you or some of you being the highest court of law or equity of the said state in which a decision could be had, in the said suit between The Kansas City Southern Railway Company, defendant and plaintiff in error, and J. M. Carl, plaintiff and defendant in error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, privilege and immunity specially set up or claimed under such statute a manifest error hath happened to the great damage of the said The Kansas City Southern Railway Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Su-

preme Court of the United States together with this writ so that you may have the same at Washington on the 21st day of January, 1910, next, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 22nd day of December, A. D. 1909.

[The Seal of the Circuit Court of East. Dist. Ark., U. S. A., Western Division.]

W. P. FEILD,
Clerk of the Circuit Court of the United States for the Eastern District of Arkansas, Western Division,
By W. PRESLEY FEILD,
Deputy Clerk.

Allowed by:

EDGAR A. McCULLOCH,
Chief Justice of the Supreme Court of the State of Arkansas, Now and at the Time of the Rendition of said Judgment.

68 *Statement of Clerk in re Bond—Writ of Error, etc.*

STATE OF ARKANSAS,
In the Supreme Court:

I, P. D. English, clerk of the said Court, do hereby certify that there was lodged with me as such clerk on December 22, 1909, in the matter of The Kansas City Southern Railway Company, appellant v. J. M. Carl, appellee.

1. The original bond of which a copy is herein set forth.

2. One copy of the writ of error, as herein set forth,—and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this — day of January 1910.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk of the Supreme Court of Arkansas.

69 *Citation—Acceptance of Service.*

Citation.

UNITED STATES OF AMERICA, *ss:*

To J. M. Carl, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington within

thirty days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Arkansas wherein The Kansas City Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edgar A. McCulloch Chief Justice of the Supreme Court of Arkansas, this 22 day of December, A. D. 1909.

EDGAR A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas, Now and at the Time of the Rendition of said Judgment.

Attest:
P. D. ENGLISH, *Clerk.*
By W. P. SADLER, *D. C.*

Copy of the within citation received this 25th day of December, 1909.

L. H. McGILL,
Attorney for Defendant in Error.

70 *Return to Writ of Error.*

Clerk's Return.

SUPREME COURT OF THE STATE OF ARKANSAS, *set:*

I do hereby return due and perfect obedience to the within writ and do hereby under the seal of the said Supreme Court of the State of Arkansas distinctly and openly send the record and proceedings with all things concerning the same.

Witness my hand as clerk and the seal of said court issued at my office in Little Rock, Arkansas this — day of December, A. D., 1909.

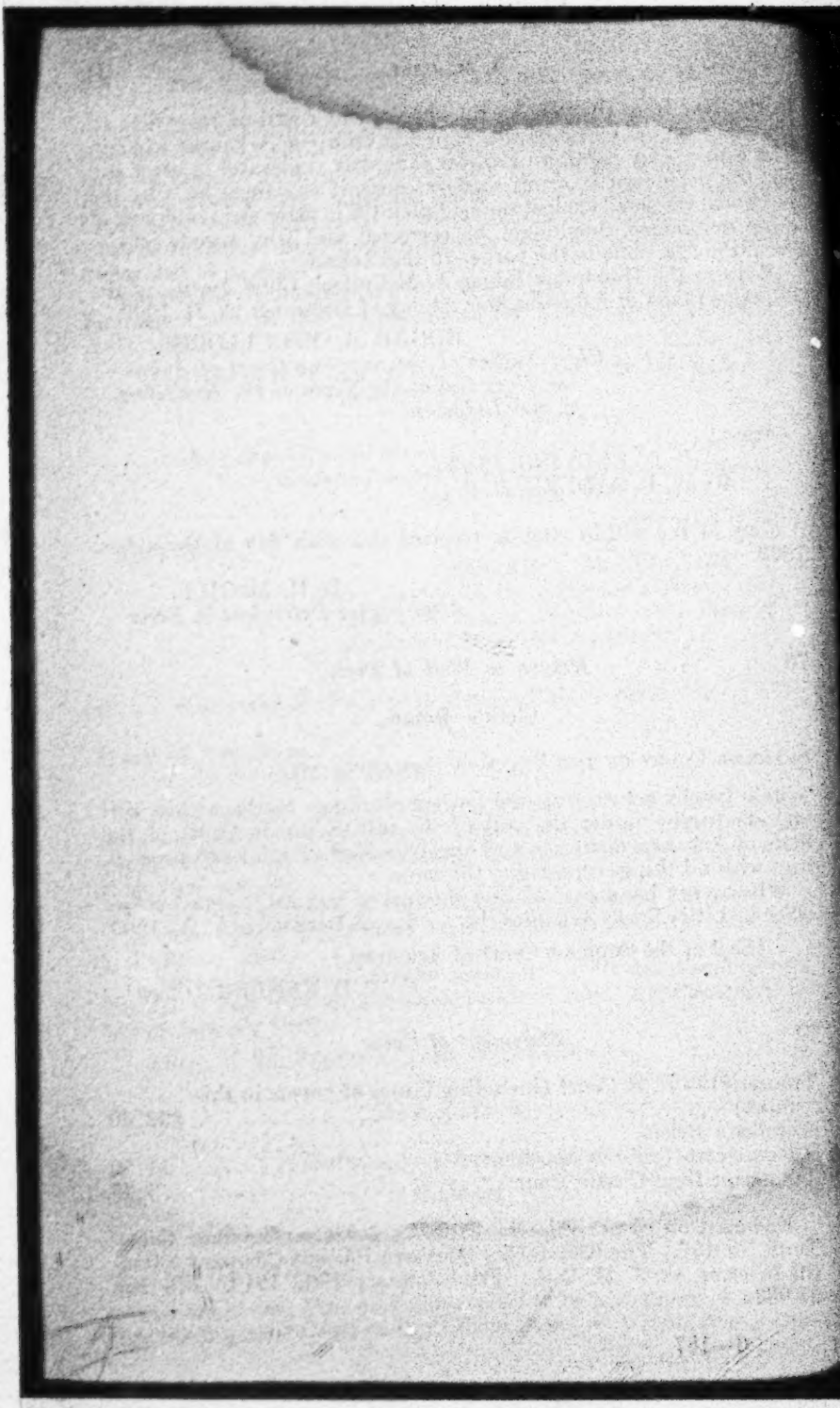
[Seal of the Supreme Court of Arkansas.]

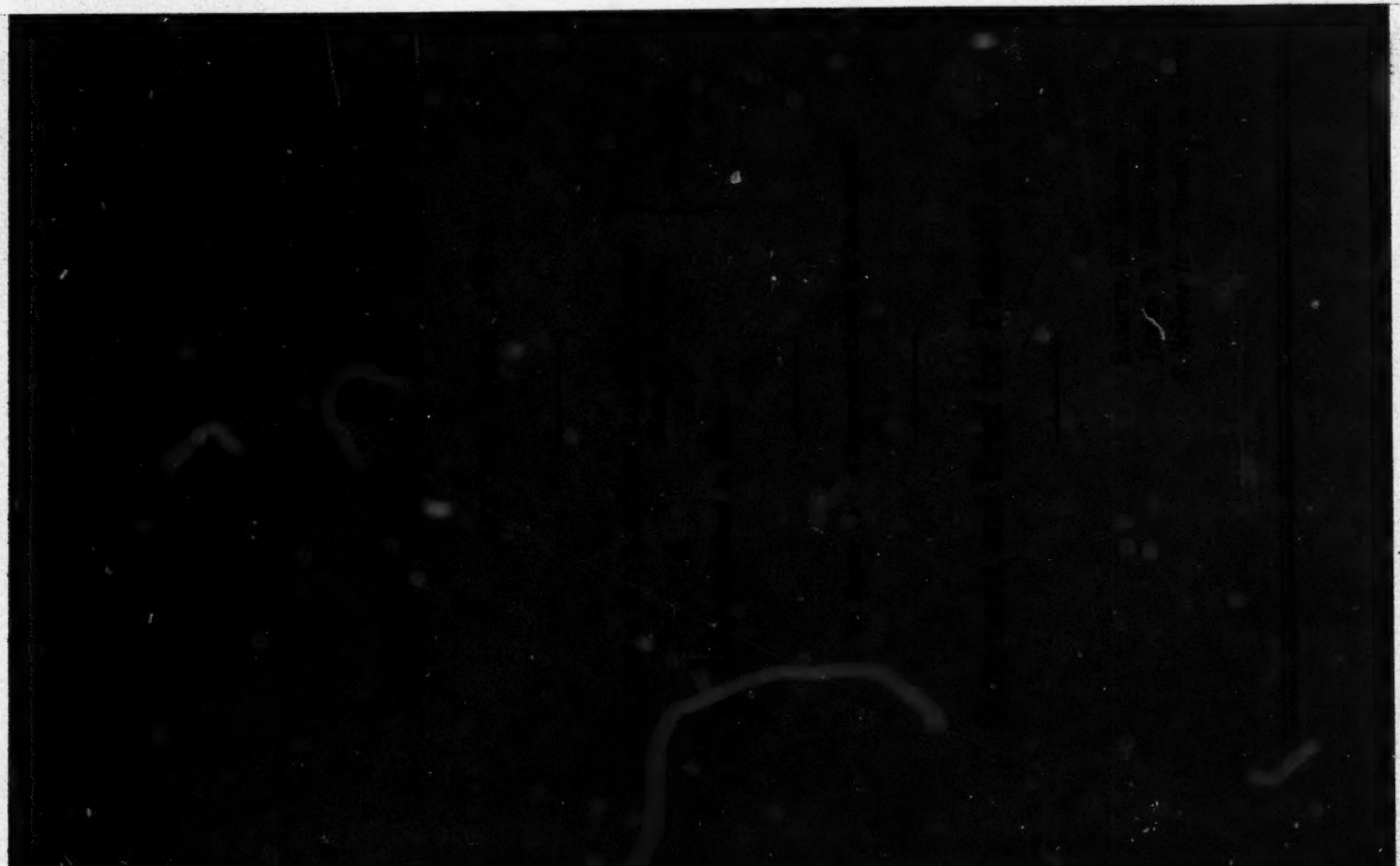
P. D. ENGLISH, *Clerk.*

71 *Statement of Costs.*

Transcript to U. S. Court (including filings of papers in this court)	$32.00
Appellee's Briefs	
Advance costs (paid by appellant)	11.50
Transcript from Circuit Court	8.25

Endorsed on cover: File No. 21,963. Arkansas Supreme Court. Term No. 187. The Kansas City Southern Railway Company, plaintiff in error, vs. J. M. Carl. Filed January 15th, 1910. File No. 21,963.





—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1911.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*
vs.
J. M. CARL, *Defendant in Error.*

No. 187.

In Error to the Supreme Court of Arkansas.

STATEMENT.

This case involves the validity of a contract with a railway company, whereby a shipper of household goods agrees, in consideration of a lower freight rate on which the shipment is made, that their value, in case of loss, shall not exceed $5.00 per hundred pounds.

The defendant in error, herein referred to as the plaintiff, obtained judgment against the plaintiff in error, herein referred to as the defendant, in the Circuit Court of Benton County, Arkansas, for $75.00 as the value of certain household goods shipped from Lawton, Oklahoma, on October 9th, 1907, to Gentry, Arkan-

ma, the origin of the shipment being on the line of the Chicago, Rock Island & Pacific, the point of destination being on the line of the defendant, and the junction point of the two roads being at Howe, Oklahoma. This judgment was affirmed by the Supreme Court of Arkansas. (*The Kansas City Southern Railway Company* v. *Carl*, 121 S. W. Rep., 982, s. c. 91 Ark., 97), and the defendant, to reverse that judgment, brings the case here on writ of error.

The case originated in a justice's court, and the pleadings were informal.

The evidence showed without contradiction, that the plaintiff on the day named, shipped from Lawton, Oklahoma, two boxes and one barrel of household goods, weighing 400 pounds, consigned to Gentry, Arkansas, (Rec., p. 6), and received a bill of lading, (Rec., p. 14), containing the notation "O. R. Val. 5.00 cwt.," and executed a contract of release (Rec., 15), as follows:

Chicago, Rock Island & Pacific Ry.
Lawton Station, 10, 5, 1901.

In consideration of the price (special Rates on Carloads and first class rates on less quantities) at which the Chicago, Rock Island & Pacific Railway Company hereby agrees to transport a quantity of household goods, furniture or emigrants' movables (including live stock, if any in the car), from Lawton, O. T. Station to Gentry, Ark. Station, the same being consigned to J. M. Carl, I, the Consignor, hereby release the said Company, and all other Railroad and Transportation Companies, over whose lines the above property may pass to destination, from all liability from any loss or damage said property may sustain in excess of $5.00 per 100 lbs., and I hereby guarantee all charges for freight on connection lines to destination.

J. M. Carl, *Consignor.*

N. B. When household goods, etc., are shipped at rate based on valuation of $5.00 per hundred pounds, agents will require the owner or consignor to sign this agreement, and when signed, same must be kept on file at forwarding station. Agent must then note on Way Bill, "Released to valuation of $5.00 per hundred pounds."

There were, at the time of shipment, two duly established rates of freight applying on household goods from Lawton, Oklahoma, the point of origin, over the Rock Island Railroad to Howe, Oklahoma, the junction point, one of 95 cents per cwt., applying

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when the valuation was released to $5.00 per hundred pounds, and the other of $1.26 per cwt., when the valuation was not so released (Rec. 16). There were also at the time of the shipment two duly established rates of freight applying on household goods from Howe, Oklahoma, the junction point, over the line of the defendant to Gentry, Arkansas, the point of destination; one of 72 cents per hundred pounds when the valuation was released to $5.00 per cwt., and the other, of $1.08 per hundred pounds, when the valuation was not so released (Rec. 17). Or, combining the two rates, there was a through rate, (made up of a combination of the two locals), of $1.54 per cwt., from the point of origin to destination, when the shipment was released to a valuation of $5.00 per cwt., and another corresponding through rate from point of origin to destination, of $2.34 per cwt., when the valuation was not so released (Rec. 17). The tariffs establishing these rates were duly filed with the Interstate Commerce Commission (Rec. 16-17). The shipment was duly received and delivered at destination, except one box of household goods, the actual value of which was $75.00. The plaintiff, in accepting the bill of lading and in executing the contract of release, did not read either of them, although he could read and had ample opportunity to do so (Rec. p. 18). The agent asked him to sign the contract and he did so without asking any questions. Plaintiff did not have any actual knowledge about two rates of freight.

Upon this state of facts, the court gave certain instructions of its own motion, and refused to give those and each of them requested by the defendant, as more particularly set forth in the specification of errors.

The jury found for the plaintiff in the sum of $75.00, and judgment was rendered accordingly. The defendant appealed to the Supreme Court of the State of Arkansas, assigning as error that the lower court erred in refusing to give the instructions requested by the defendant and that it had adopted an improper and unwarranted construction of the Interstate Commerce Act, and particularly section 20 thereof, in holding that the bill of lading and the contract of release above referred to, were obnoxious to its terms and conditions.

The Supreme Court of Arkansas adopted the view of the

lower court and held that the Interstate Commerce Act rendered invalid the provision limiting the recovery to $5.00 per cwt. in the event of loss.

The action of the lower court in giving and refusing instruction, was not specifically passed upon, for the reason that in the opinion of the Supreme Court, the judgment being right upon the undisputed testimony, no prejudice could have resulted to appellant from any instructions given by the court.

The ruling of the Supreme Court upon the questions involved in this appeal, is as follows:

> The express terms of the (Hepburn) act make the carrier liable for any loss caused by it, and provide that no contract shall exempt it from the liability imposed. It is manifest that the act renders invalid all stipulations designed to limit liability for losses caused by the carrier. Public policy forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. For the same reason, a statute may prohibit it from making stipulations in a contract which provide for such partial exemption. If the initial carrier is prohibited from making a contract limiting its own liability, it is obvious that it could not make a contract limiting the liability of its connecting carriers; for the section of the Hepburn act under discussion provides that the carrier issuing the bill of lading may recover from the connecting carrier on whose line the loss occurs the amount of the loss it may be required to pay the owner.

This cause is brought to this court to secure a reversal of this holding of the Supreme Court of the State of Arkansas.

SPECIFICATION OF ERRORS.

The assignments of error, (Rec., 28-36), present substantially but the one question of the validity of the provision contained in the bill of lading and contract of release limiting liability for loss to $5.00 per hundred pounds, in view of section 20 of the Interstate Commerce Act as amended, although that question arose and was passed upon in various ways. The defendant therefore specifies the errors of the Supreme Court of Arkansas herein relied upon, as follows:

1. The court erred in holding that the bill of lading and con-

tract of release were invalid and in violation of the so-called Hepburn Act, being the act of June 29th, 1906, upon the ground, as stated by the court, that it was an attempt to exempt the carriers from liability, where as it is, as we contend, a well recognized and lawful provision, supported by a sufficient consideration, by which the value of the property was fixed and determined in the event of its loss.

2. The court erred in declining to hold that the lower court should have given the following instruction:

> The contract releasing the value of the goods shipped to $5.00 per hundred pounds was a legal and binding contract and when entered into by the parties both are bound by it, and in case of loss of the goods the plaintiff, if his goods were lost, can only recover $5.00 for each 100 pounds so lost.

3. The court erred in declining to hold that the lower court should have given the following instruction:

> If the plaintiff signed the contract without reading it, he is bound by its terms.

4. The court erred in declining to hold that the lower court should have given the following instruction:

> If the plaintiff by signing the contract, releasing the value of his goods to $5.00 per 100 pounds, received a lower rate than he would have received without signing such contract, then said contract is binding, and the plaintiff could only recover on said basis.

5. The court erred in declining to hold that the lower court should have given the following instruction:

> It would be a violation of the Interstate Commerce law for the initial carrier or the defendant to give the plaintiff the benefit of the lower rate and then give him the benefit of the full liability in case of loss; such acts would be a violation of the Interstate Commerce Law of the United States.

6. The court erred in declining to hold that the lower court should have given the following instruction:

> Under the Interstate Commerce Law of the United States, the contract introduced in evidence is valid and binding, and the plaintiff can only recover, if his goods are lost, $5.00 per 100 pounds on the goods lost.

7. The court erroneously construed the said Acts of Congress in refusing to hold that the trial court committed error in giving the following instructions and each of them:

(a) If you find the plaintiff's goods were lost through the negligence of the defendant company, he would be entitled to recover the market value of the goods lost less the amount of freight that would have been due on the same, unless you find that the plaintiff made a valid contract limiting the amount to be recovered in case of loss, in which case he would only be entitled to recover the amount provided for in such contract.

(b) If you find from the evidence that the plaintiff at the time of shipping his goods signed a contract limiting the amount of his recovery in case of loss, he would be bound by such contract, if the same was entered into by him fairly and without any fraud or concealment on the part of the railroad company.

(c) If you find from a preponderance of the evidence that plaintiff was induced to enter into such contract by unfair means and by fraudulent concealment on the part of the agent of the railroad company which received the goods for shipment of the fact that there were two freight rates for such goods and of the fact that such contract was for the purpose of limiting the amount of loss, and that such agent did not explain to plaintiff the purpose of such contract and knew at the time that plaintiff signed the same without reading it or having it read, and you further find that the plaintiff did not in fact know the contents of such contract or understand its purpose when he signed it, but signed it in good faith, believing that it was merely for the purpose of showing that his goods had been received by the company for shipment, he would not be bound by the contract.

(d) If you find from the evidence that there were two freight rates in existence at the time plaintiff's goods were shipped and that the railroad agent merely offered the plaintiff one rate, without informing him of the fact that he had the right to pay a higher rate without limiting the amount of recovery in case of loss and that plaintiff had no knowledge or information of that fact he would not be bound by the contract signed by him, unless you find from the evidence that the railroad company actually used the two rates in shipment of household goods and in good faith offered plaintiff the choice of the two rates and obtained his signature to the contract without any fraud or concealment or unfair means.

8. The court erroneously construed said Hepburn Act by refusing to give effect to Section 6 of the said Interstate Commerce Law as amended, which section prohibits any carrier, subject to said Act, from charging, demanding, collecting or receiving a greater or less or different compensation than that provided in the published and filed tariffs, and by further holding that the goods of the plaintiff which were shipped at the less of two rates, both of which were published and filed, if lost, should be paid for at full value, although said goods by said contract of shipment were valued to $5.00 per hundred weight, and although the rate applied to said shipment was based upon the valuation of $5.00 per hundred weight and although said rate was duly published and filed, as the law requires.

9. The court erroneously construed said acts of Congress by holding in effect that where a carrier has published and filed, as required by the Interstate Commerce Law, a higher and lower rate for the transportation of household goods, and has made the lower rate conditional upon the execution by the shipper of a released valuation on the goods, the shipper notwithstanding such condition, in the event of loss of said goods, may recover the full value thereof under full common law liability, although no order has been made by the Interstate Commerce Commission setting aside the higher of the two rates, as unreasonable or otherwise contrary to the provisions of the Interstate Commerce Law.

BRIEF.

I.

The record properly presents a federal question which may be reviewed here upon writ of error to the State Supreme Court.

The Supreme Court of Arkansas expressly held "that the contract in question (limiting liability to a specified valuation), was prohibited by the terms of the Hepburn Act, and is invalid in so far as it attempts to limit the liability of a carrier in case of loss caused by it." The defendant's contention in the state courts, as well as in this court, is that a contract limiting liability is not prohibited by a proper construction of the Hepburn Act. Further-

more, the defendant's tariff duly filed and published as required by law, applying from Howe, I. T. (the point of junction with the Rock Island), to Gentry, Arkansas, provided a rate of $1.08 per cwt. on shipments of household goods and also provided for a lower rate of seventy-two cents per cwt. on shipments of household goods released to $5.00 per cwt. valuation. The shipment was made upon the lower rate and at the released valuation. The defendant contended in the state courts, and contends here, that the released valuation being a part of the published tariff, is, in effect, a part of the rate itself, and must be enforced, and that a proper construction of the Interstate Commerce Act does not prevent the enforcement thereof. This claim of the defendant arising under the Interstate Commerce Act and tariffs filed in accordance with its provisions was denied by the lower court of the state in its refusal to give the instructions requested by the defendant, and by the State Supreme Court in its holding that the released valuation clause was invalid, and in its refusal to hold that the lower court erred in declining to give the instructions requested by the defendant. These are Federal questions and they have been properly raised for a review in this court.

St. Louis Railway Company v. *Taylor*, 210 U. S., 281;
Cooke v. *Avery*, 147 U. S., 375;
Hammond v. *Whittridge*, 204 U. S., 538;
Talbot v. *First Nat'l Bank*, 185 U. S., 172;
Nutt v. *Knut*, 200 U. S., 12.

II.

The Hepburn Act does not prevent a common carrier from making a valid contract limiting its liability in case of loss to an agreed valuation, when such contract rests upon a legal consideration.

The foregoing proposition is the reverse of the statements of law contained in the opinion of the Supreme Court of Arkansas (Rec., p. 27).

The portion of the Hepburn Act which the state court construed as invalidating the contract limiting liability to a specified valuation, is contained in Section 20, as follows:

That any common carrier, railroad or transportation company, receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

The legislative intent contained in the language above quoted, is perfectly clear, in view of the decision of this court in *Atlantic Coast Line Railroad Company* v. *Riverside Mills*, 219 U. S., 186. Prior to its enactment, the carriers were at liberty to limit their contract of carriage to their own lines. If a shipper over several connecting lines should desire to sue for loss or damage to his property, he must, at his peril, bring an action against the carrier in whose actual custody the property was at the time of its loss or damage, or else fail in his action. The sole purpose of the act was to give the shipper a right of action against the initial carrier issuing the bill of lading, for any loss or damage occurring during the entire transit, even though a number of connecting carriers were involved, and this purpose was accomplished by requiring the initial carrier to assume a responsibility for the property during its entire transit, and making the connecting carriers its agency for the purpose of through carriage. There was no purpose to disturb or interfere with the common law right of the carriers, which had existed from the beginning, of *limiting* the extent of their liability. They may not contract for *exemption* from liability

but they may agree upon the valuation of property and provide that the recovery shall be limited to that sum in the event of loss.

The court in the Riverside Mills case, *supra*, said:

> Along with this singleness of rate and continuity of carriage there grew up the practice by receiving carriers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier, for the purpose of carriage, would become the agent of the primary carrier. The common form of receipt, as the court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package must go, a separate agreement limiting the carrier liability of each separate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage, or delay occurring on its part of the route. If such primary carrier was able to show delivery to the rails of the next succeeding carrier, although the package might and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn, he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged, and had no access to the records of the connecting carriers who, in turn, had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed.
>
> This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate.

The whole scope and purpose of the act was thus stated by the court:

> In substance Congress has said to such carriers: "If you receive articles for transportation from a point in one state to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents, and not as agents of the shipper." It is therefore not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only

for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable.

It is perfectly clear that it was not the intention of Congress to take from the carrier the right to agree with the shipper as to the value of the property transported, and to make that the measure of damages in case of loss, particularly where the agreement as to value is supported by the consideration of a lower freight rate. There is a wide distinction in the law between a rule, or regulation, or contract limiting liability in the event of loss to an agreed valuation, and an attempt by rule, regulation or contract, by which it is sought to *exempt* the carrier from a liability to respond in damages for its negligence. The act expressly prohibits any contract undertaking to *exempt* the carrier from liability *imposed by the act*, but there is nothing directly or indirectly which seeks to interfere with the well established right of a carrier to limit its liability by an agreement with the shipper as to the value of the commodity transported.

It must be assumed that Congress, in enacting this legislation, did so, having before it the rule universally established in both state and Federal jurisdiction, that a carrier may, by contract, limit its liability to an agreed valuation in the event of the loss of articles particularly where such agreement, as in this case, is based upon a valuable consideration.

The rule in this jurisdiction is sustained by the following cases:

Hart v. *Pa. R. R. Co.*, 112 U. S., 331;
Liverpool Steam Co. v. *Insurance Co.*, 129 U. S., 397;
Primrose v. *Western Union Telegraph Co.*, 154 U. S., 1;
Chicago Ry. Co. v. *Solan*, 169 U. S., 133;
Cau v. *Ry. Co.*, 194 U. S., 427;
Jennings v. *Smith*, 106 Fed., 139;
Mo. K. & T. Ry. Co. v. *Patrick*, 144 Fed., 632.

Some of the leading cases in the state courts, are as follows:

Ballou v. *Earle*, 17 R. I., 441;
Louisville & N. R. Co. v. *Sherrod*, 84 Ala., 178;
Starnes v. *L. & N. R. Co.*, 91 Tenn., 516;
Ullman v. *C. & N. W. Ry. Co.*, 113 Wis., 150;
Richmond & D. R. Co. v. *Payne*, 86 Va., 481;

Norville v. *Oregon R. & Nav. Co.*, 41 Or., 177;
Zouch v. *Chesapeake & O. Ry. Co.*, 36 W. Va., 534;
Pierce v. *Southern Pac. Co.*, 120 Cal., 156;
Alair v. *Northern Pac. R. Co.*, 55 Minn., 160;
Douglas v. *Minnesota T. R. Co.*, 62 Minn., 292;
Dunlay v. *Boston & M. Co.*, 66 N. M., 268.

In the following cases, stipulations substantially the same as in the case at bar, releasing the value of property in case of loss to $5.00 per hundred pounds were upheld:

Carleton v. *N. Y. C. & H. R. R. R. Co.*, 117 N. Y. Sup., 1021 s. c. 104 Misc., 51;
M. K. & T. Ry. Co. v. *McLaughlin*, 116 Pac. Rep., 811;
M. K. & T. Ry. Co. v. *Patrick*, 144 Fed. Rep., 684;
Huguelet v. *Worfield*, 65 S. E. Rep., 985;
Lansing v. *N. Y. C. & H. R. R. R. Co.*, 102 N. Y. Sup., 1092 s. c. 52 Misc. Rep., 334;
Hastl v. *C. M. & St. P. R. R. Co.*, 82 Ia., 477.

It is to be noted that the language of the act is that no contract, receipt, rule or regulation, "shall exempt such common carrier, railroad, or transportation company from the liability *hereby* imposed." It is obvious that the common carrier referred to, is the initial carrier issuing the bill of lading and that the prohibition of the act applies only to an attempt on the part of such initial carrier to contract against the liability imposed by the act, which is, of course, the liability of the initial carrier for the default or negligence of itself and of its connecting carriers in the line of through transportation.

The act creates a through contract of transportation by the mere act of the initial carrier in accepting the property and issuing a bill of lading therefor, and makes the connecting carriers the agents of the initial carrier for the purpose of such through transportation. The only liability created by the act, is the responsibility of the initial carrier to respond for its own negligence and the negligence of its connecting carriers. That liability cannot be contracted away, but remains and may be availed of by any shipper, notwithstanding any attempt on the part of the carriers to relieve themselves from such responsibility. It is equally obvious that it was no part of the intent of the law-making power in

the enactment of this statute to prevent carrier and shipper from enjoying the long established right of agreeing upon the valuation of the property, and that in the event of loss or damage the responsibility of the carrier shall be measured by such agreed valuation.

It is to be remembered that the action in this case is not against the initial carrier, but against a connecting carrier. The Hepburn Act does not purport in any way to increase the liability of connecting carriers or impose any obligations upon them whatsoever. The connecting carriers are therefore free to make such contracts as may be permitted by the law, unaffected by the Hepburn Act. The shipper is given the right at his election to bring his action against the initial carrier, in which even the latter is under such disabilities as the Hepburn Act imposes. The shipper, on the other hand, may at his option bring suit against the connecting carrier, as has been done in this case, in which event he may not avail himself of any of the provisions of the act.

The grounds upon which a release of liability is upheld are peculiarly applicable to a shipment of household goods, which are not only ordinarily boxed up and so incapable of being examined or valued, by the carrier, but are of a varying value and frequently of very little value. Attention is called to the testimony of the plaintiff, (Rec., 6), who stated that the barrel—one of the three articles contained in the shipment—"contained rubbish, and, I think, about a case of fruit."

The value of the contents of the box that was lost was wholly within the knowledge of the shipper, as no opportunity was ever afforded the agents of either railway company to examine them. Under such circumstances, we submit that the law deals justly with a shipper of household goods when it provides that they may be transported on a higher rate with full common law liability, or upon a reduced valuation at a lower rate. It cannot be said that there is any unreasonable disparity between an agreed valuation of $5.00 per cwt. in the case of household goods, and the actual value of the property, so that the case falls well within the rule that the agreed valuation must be a reasonable one and sustaining a fair relation to the actual value of the property.

In *Hart v. Pa. R. R. Co.*, 112 U. S., 331, where liability for

loss was limited to an agreed valuation of $1,200 in the bill of lading, although the actual value of the property was over $35,000, the distinction between a limitation of value and an attempt of a carrier to exempt itself from the consequences of its own negligence was sharply and clearly drawn. The contention of the plaintiff in that case, was:

> That the defendant was forbidden by public policy to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence.

The court answered the contention as follows:

> It is just to hold the shipper to his agreement fairly made, as to the value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to the value in this case stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The court further says, in connection with the distinction between a limitation as to value and an exemption from liability:

> The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

The well established distinction between a limitation of lia-

lility and a contract for the exemption of all responsibility for negligence, is drawn in *Liverpool Steam Company* v. *Phoenix Insurance Co.*, 129 U. S. 397, where the court said:

> In the one case (*Hart* v. *Pa. R. R. Co.*, 112 U. S., 331), a contract fairly made between a railroad company and the owner of the goods, and signed by the latter, by which he was to pay a rate of freight based on the condition that the company assumed liability only to the extent of an agreed valuation of the goods, even in case of loss or damage by its negligence, was upheld as just and reasonable, because a proper and lawful mode of securing a due proportion between the amount for which the carrier might be responsible and the compensation which he received, and of protecting himself against extravagant or fanciful valuations—*which is quite different from exempting himself from all responsibility whatever for the negligence of himself and his servants.*

In *Grenwald* v. *Barrett*, 190 N. Y., 170, the court had under consideration the application of Sec. 20 of the Interstate Commerce Act to a provision in a receipt issued by an express company stating that in consideration of a reduced rate, the value of the baggage in case of loss, should not exceed $50.00. It was held that the limitation was valid. The court said:

> The purpose of the provision which we have quoted from the Hepburn act was obvious. It was to render the initial carrier in the case of interstate transportation over connecting lines, liable to the lawful holder of its receipt or bill of lading for any loss or injury to the property shipped, whether such loss or injury occurred after the goods had passed out of the hands of the initial carrier or not; and furthermore to prevent interstate carriers from exempting themselves from liability for the loss of property or damage thereto after it had passed into the hands of another carrier to be transported to its destination. The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried, and the propriety of this practice and the legality of contracts signed by the shipper agreeing upon a valuation of

the property were distinctly upheld by the Supreme Court of the United States in *Hart v. Penn. R. R. Co.*, 112 U. S. 331, 341, 5 Sup. Ct. 151, 156 (28 L. Ed. 717). In that case Mr. Justice Blatchford said: "It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." The doctrine of this case is in harmony with the uniform course of decisions in this state. *Ridge v. Dinsmore*, 91 N. Y., 166, 10 Jun. Rep., 375; *Magnin v. Dinsmore*, 70 N. Y., 410, 26 Am. Rep., 606; *Shaver v. N. Y. C. H. R. R. R. Co.*, 137 N. Y., 140, 33 N. E. 68.

A case on all fours with the case at bar has been determined by the Supreme Court of New Jersey since the decision of the Appellate Division herein. *Travis v. Wells Fargo & Co.*, 74 Atl., 444. The action was brought to recover damages for the loss of a trunk, and the receipt given to the plaintiff by the defendant stated that its liability was limited to $50, unless a greater value was stated therein. No value was stated by the shipper, and the defendant insisted upon the trial that the plaintiff's recovery must be limited to $50.00. In that case, as here, the Hepburn act was relied upon to overcome the effect of the receipt by the plaintiffs, who claimed to recover the full value of the lost trunk. The Supreme Court of New Jersey referred to the opinion of Mr. Justice Scott in the present case (180 App. Div., 696, 115 N. Y. Sup., 311) with approval, pronouncing it a convincing exposition of the purpose of the federal statute. "The statute means," said Reed, J., "that, instead of a common carrier being liable as at common law for any loss caused by itself, it shall not only be liable for such loss, but for any loss caused by a connecting carrier to which it has delivered its goods. There was no intention to impose upon the receiving carrier any additional liability for goods lost by it, and that the loss under the statute, as before, is the loss of goods of such value as the carrier has bargained to carry, and is, under his contract, to be paid for carrying. It was not intended to abrogate the right to limit liabilities for loss in accordance with the amount paid for carriage." The same view was taken by the Supreme Judicial Court of Massachu-

sells in *Barnard* v. *Adams Express Co.*, 91 N. E. 385, which the prevailing opinion at the Appellate Division in the present case is also approvingly cited. There Chief Justice Knowlton, speaking of the $50 valuation clause in the express receipt, declares that it is not an exemption from liability for negligence in the management of property, within the meaning of the federal statute. "It is a contract as to what the property is in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier or limit his obligation in the care and management of that which is intrusted to him. It is to describe and define the subject matter of the contract so far as the parties care to define it for the purpose of showing of what value that is which comes into the carrier's possession and for which he must account in the performance of his duty as a carrier."

In order to regulate its charges to its customers with reference to the value of the property transported, a common carrier may demand of the shipper a declaration of such value, or may agree with him that in default of a statement the value shall be deemed a given amount. This agreement may be direct and express, or it may arise indirectly out of the acceptance by the shipper of a receipt from the carrier in which it is stated that the value is to be considered a sum specified, if no other has been given by the shipper. Such was the character of the receipt given by the representative of the express company to the plaintiffs in the present case. They had employed the same form of receipt in shipping goods by the Adams Express Company for a period of six years and must be charged with a knowledge of its contents, in the absence of any proof whatever that they were not acquainted therewith. There was a book of blank receipts in their custody and they made the entries in the blanks themselves and completely prepared the receipts for signature by the express company's driver when he called for and took the goods. The contract of agreed valuation being one which the parties could lawfully make, the proof here required a finding that it had been made, and this fixed the measure of the plaintiff's damages at $50, and no more. Hence the order of the Appellate Division limiting the recovery to that amount was right, and it should be affirmed, with costs.

In *Fielder & Turley* v. *Adams Express Co.*, 71 S. E. Rep., 99, an action was brought against the Adams Express Company to recover the value of certain goods shipped to them over said company's line, and lost in transit. The bill of lading under which

the goods were shipped limited the liability of the company to $50.00. The amount sought to be recovered was $114.15. The court held that the provision limiting the liability was valid, and was not prohibited by the Interstate Commerce Act. The Court said:

We do not see how it can be said to inhibit a variation in rate or liability on account of difference in value. That portion of Section 20 to which we have referred deals with *the question of liability*, not the *measure* or *extent* thereof. At least that is its primary or main purpose. It does not deal, expressly, with the limitation of liability. It says the common carrier shall be liable for loss, damage, or injury to the property, but does not fix any measure or standard of compensation. Of course it destroys the effect of all receipts, contracts, rules, and regulations purporting to wholly exempt interstate common carriers. Its exact terms are that the carrier shall be liable for loss, damage, or injury, and no contract, receipt, rule, or regulation shall exempt it. When this act was passed, the right of common carriers to limit their liability in the manner in which this one has done so had been declared by the federal Supreme Court and many others. Congress is deemed to have had knowledge of this, and, having such knowledge, it placed no express provision in the act abolishing the right or inhibiting the practice. The purpose of this clause of the statute was to make the initial carrier liable for loss, damage, or injury to goods entrusted to it for interstate transportation, whether occasioned by negligence or not, on its own line or elsewhere, notwithstanding any contract, receipt, rule, or regulation purporting or attempting to relieve from liability therefor. It does not deal with the extent of liability.

The limitation clause in one of its aspects is necessary to the protection of common carriers. In an action for loss, damage, or injury, when no agreement has been made respecting the value of property, the carrier is at a great disadvantage in respect to the evidence of value. The shipper occupies a superior ground. Carriers have just and reasonable ground for requiring a specification of value, setting a limit beyond which no damages can be claimed, as a measure of protection against exorbitant and unjust demands. On the other hand, a shipper seeking or obtaining a valuation below the actual value of the property for the purpose of obtaining a low rate is guilty of an act of misrepresentation. Hence there is no hardship nor injustice in holding him bound by his representa-

tion or agreement as to the value. This contract of limitation therefore rests upon good solid reason and just considerations. The abolition thereof would have introduced a very great change in the methods of transportation for purposes extending far beyond any indicated by the express terms of the act.

In *Blackwell* v. *Southern Pacific Co.*, 184 Fed., 489, it was sought to recover damages resulting from the failure of the carrier to deliver in good order and condition certain consignments of whiskey shipped over its lines. The amount claimed was the full market value of the goods lost. The consignments, as in the case at bar, moved under tariff schedules regularly published and filed as required by law. In that case also there were two rates of freight, one based upon a released valuation, and the other rate based upon the carrier's common law liability. The court upheld the stipulation which was in substance similar to the one under consideration here. The court based its ruling upon a decision of the Supreme Court of California (151 Cal., 765) and also upon the decision of this court in the case of *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S., 331, and expresaly held that the Interstate Commerce Act did not prohibit the making of a contract limiting the amount of liability in case of loss. The court, among other things, said:

> As we have seen the rate in this case was made to depend upon the value of the commodity, that value being agreed upon for the purpose of securing the advantage of the lower rate, and in that respect this case is squarely within the doctrine as there stated.
>
> While it is true that such a contract will not be enforced if unfair, that only means that the agreement must not have been procured from the shipper by the deceit or coercive action of the carrier; and as we have seen, there is nothing of that nature appearing in this case.

The Hart case was followed in the case of *Geo. N. Pierce Co.* v. *Wells Fargo & Company*, 180 Fed. Rep., 561. The plaintiff made a shipment of automobiles valued at $15,000, by express, from New York to San Francisco. The bill of lading limited the liability to $50.00. The Circuit Court of Appeals of the Second Circuit upheld the limitation, basing its opinion in part upon the Hart, *supra*, case, and holding that the Interstate Commerce Act did not prohibit the making of a contract thus limiting the liability of

the carrier. In upholding the contract the said court used this language:

> And we think it would be in the highest degree violative of public policy to permit a shipper who has pecuniarily benefitted by the valuation he has deliberately agreed upon to repudiate his agreement and recover against the carrier on a higher valuation.

The Supreme Judicial Court of Massachusetts has also held that section 20 of the Hepburn Act does not prohibit the making of a contract limiting the liability of the carrier. (*Bernard* v. *Adams Express Co.*, 91 N. E., Rep., 825.) This was a suit to recover for the loss of a package of the value of $154.80 delivered to the defendant. The bill of lading limited the liability to $50.00. The package was lost while in the defendant's possession, and no explanation of its loss was offered. The shipper relied upon the section of the Hepburn Act under consideration as invalidating this limitation of liability. After quoting the act, the court said:

> Under the descisions in this commonwealth and in the Supreme Court of the United States there is no doubt that before the enactment of this law the plaintiff upon the facts and findings in the present case, would be estopped from claiming more than $50.00 as the value of the package.

The court considered whether the Hepburn Act had changed the law in this respect, and said:

> But such a contract as we are considering in this case, is not an exemption from liability for negligence in the management of a property within the meaning of the statute. It is a contract as to what the property is in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes.

The exact point was also decided the same way by the Supreme Court of New Jersey in *Travis* v. *Wells Fargo & Company*, 74 Atl. Rep., 444. In that case, the plaintiff brought suit to recover damages for the loss of a trunk and its contents, which had been shipped from Passaic, New Jersey, to Gernwood, Pennsylvania. There was a limitation in the shipping contract to $50.00 in case of loss. In holding that the Hepburn Act did not prohibit the releasing of the property to a certain value, the court said:

> The liability imposed by the Act is a liability for a loss by a connecting carrier or carriers to which it had delivered goods to complete the transportation. It is from that liability that the receiving carrier cannot under the statute exempt itself by contract. The statute means that instead of a common carrier being liable as at common law for any loss caused by itself, it shall not only be liable for such loss, but for any loss caused by a connecting carrier to which it has delivered its goods. There was no intention to impose upon the receiving carrier any additional liability for goods lost by it and that the loss under the statute as before is the loss of goods of such value as the carrier has bargained to carry and is under this contract to be paid for carrying. It was not intended to abrogate the right to limit liabilities for loss in accordance with the amount paid for carriage, which right was vindicated by our court of errors in case of *Atkinson* v. *N. Y. Transfer Co.*, 71 Atl. Rep., 278. This view of the scope of Section 7 of the Interstate Commerce Act of 1906 was adopted by the unanimous judgment of the Appellate Division, first department of the New York Supreme Court. In the case of *Greenwald* v. *Weir, as president of the Adams Express Company*, 130 App. Div., 696; 115 N. Y. Sup., 311, the opinion of Judge Scott delivered in that case, is, I think, a convincing exposition of the purpose of the section under consideration.

A review of the cases cited and relied upon by the Supreme Court of Arkansas, will not, it is believed, disclose any views in conflict with the position assumed by the defendant in this case. The following are those referred to in the opinion as supporting the ruling of the court:

St. Louis Southwestern Ry. Co. v. *Grayson*, 115 S. W., 933;

Schmelzer v. *St. Louis & San Francisco Ry. Co.*, 158 Fed., 649;

Southern Pac. v. *Crenshaw Bros.*, 5 Ga. App., 675.

In none of these cases was the question here involved considered or passed upon. In each, the action was against the initial carrier. There was no question raised of an agreed valuation or of a limitation of liability to a specified value. The question considered was whether a provision in a bill of lading issued by an initial carrier undertaking to exempt itself from all responsibility for the negligence of a connecting carrier, was valid in view of the Hepburn Act. The provision of the Hepburn Act making the initial carrier responsible for the negligence of its connections and thus invalidating its effort to contract against such liability, was upheld.

Attention is called to two recent decisions of the Supreme Court of Arkansas, prior to the case at bar, in which that court held that the Hepburn Act did not prohibit the making of a contract requiring notice of loss or damage as a condition precedent to a recovery. (*St. Louis Iron Mountain & Southern Railway Co.* v. *Furlow*, 89 Ark., 404; *St. Louis & San Francisco Ry. Co.* v. *Keller*, 90 Ark., 308). In the first case the court said:

> The stipulation in question does not exempt the defendant from liability imposed by the act.

It is submitted that the rule of these cases is the correct rule. It is consistent with the true construction of the Hepburn Act, which left the carriers free to contract as they had done under the rules of the common law, except that the initial carrier assumed the burden of the liability of its connection in addition to its own.

The decision of the Commission in the matter of released rates, 18 I. C. C., 550, is not in conflict with our position. The Commission follows *Hart* v. *Pa. R. R. Co.*, *supra*, and states the rule (p. 558) as follows:

> When the shipper has placed upon his goods a specific value, the carrier accepting the same in good faith as their real value, the rate of freight being fixed in accordance therewith, the shipper cannot recover an amount in excess of the value he has disclosed, even when the loss is caused by the carrier's negligence.

III.

The plaintiff, having signed the contract of release, is conclusively presumed to have assented to both the contract and bill of lading, and will not be heard to say that he did not read them or know what they meant.

The plaintiff accepted the bill of lading on which the goods were shipped, and at the same time executed the contract of release of liability. It is not claimed that any deceit or fraud was practiced upon him, or that the contents of these documents were misrepresented, or that he was overreached in any way, or that the agreed valuation was an unfair one. He simply states that he signed the contract without reading it, and hence for this reason alone, pleads ignorance of its contents. No rule is better settled than that which holds to the letter of his engagement, one, who, having the ability and opportunity to read the document which he executes fails to do so. To permit the signer of a document to escape from the binding force of its terms without proof of fraud or duress, upon his mere statement that he signed it without reading it, would be to overturn the business conditions of the country. An abundance of authority, both state and Federal, sustain his proposition.

St. L. I. M. & S. Ry. Co. v. *Weakly*, 50 Ark., 397;
Hutchinson v. *C. St. P. M. & O. R. R. Co.*, 37 Minn., 524;
Coles v. *L. E. & St. L. R. R. Co.*, 41 Ill. App., 607;
Johnstone v. *R. & D. R. R. Co.*, 39 S. C., 58;
Western Ry. Co. v. *Harwell*, 91 Ala. Rep., 340;
Wabash etc. R. R. Co. v. *Black*, 11 Ill. App., 465;
Hart v. *Pa. R. R. Co.*, 112 U. S., 331;
John Hood Co. v. *Am. Express Co.*, 191 Mass., 27;
Black v. *Wabash etc. R. R. Co.*, 111 Ill., 351;
Stewart v. *Cleveland etc. Ry. Co.*, 91 Ind. App., 315;
Atchison etc. Ry. Co. v. *Dill*, 48 Kans., 310;
Grace v. *Adams*, 100 Mass., 505;
Davis v. *Cent. Vermont Ry. Co.*, 66 Vt., 290;
Taylor v. *Wier*, 162 Fed., 585.

In discussing this subject the Supreme Court of Iowa in *Milligan* v. *Illinois Central Railway Company*, 36 Ia., 181, said:

> It not appearing that any fraud or imposition was practiced, nor that any mistake intervened, the plaintiff must be conclusively presumed to have become acquainted with its contents and if he did not do so, the consequences of his folly and negligence must rest upon himself. Courts cannot undertake to release parties from the effects of such inattention and want of care. If once they should enter this doubtful domain it is impossible to foresee to what lengths their inference might be pressed or of what limits it would finally admit.

It is not necessary, in order to make the contract valid that the shipper should have been informed about the existence of the two rates. He signed a contract which clearly showed upon its face that there were two rates applicable to the shipment and that the consideration for the lower rate was the lesser responsibility of the carrier in the event of loss.

In holding that a contract limiting liability was valid, this court, in *Cau* v. *T. & P. Ry. Co.*, 194 U. S., 426, said:

> If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative (of different rates and liability), must be actually presented to the shipper by the carrier, we cannot agree.
>
> Inside of that limitation the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract and knowledge of the contents by the shipper will be presumed.

IV.

To permit the judgment in this case to stand is to set aside and annul the lawfully published interstate tariffs of the defendant, and to create the very discrimination which it is the purpose and intent of the interstate commerce act to prevent.

The published tariffs of the defendant, as before stated, contain two rates applicable to this shipment; one upon a full common law liability, and the other and lower rate based upon a lesser liability measured by the agreed valuation of $5.00 per cwt. "The

rate of freight," says this court in the Hart case, *supra*, "is indissolubly bound up to the valuation." It would be a departure from the tariffs to give to a shipper the full common law liability to the extent of the full value of his shipment where it moved under the lower rate applicable to a released valuation shipment. If the defendant itself undertook to do this, it would be a discrimination, a violation of its tariffs and would subject it to indictment and punishment. It would be just as much a discrimination if the defendant should do the same thing in pursuance of the command of the court.

The published tariffs of the defendant, with the conditions stated in the tariffs, which affect the rates, or the responsibility of the carrier, or the aggregate amount ultimately payable by the shipper, constitute the inflexible measure of the mutual duties and liabilities of both carrier and shipper. (*T. & P. Ry. Co.* v. *Mugg*, 202 U. S., 242; *Armour Pkg. Co.* v. *U. S.*, 209 U. S., 56). There is but one tribunal which has the power to modify the provisions of a lawfully published tariff, or to grant relief based upon a modification of them, either upon the assumption that any rate is unreasonable, or that any of its provisions are invalid, and that is the Interstate Commerce Commission. (*T. & P. Ry. Co.* v. *Abiline Cotton Oil Co.*, 204 U. S., 426).

It is submitted, therefore, that the published tariffs must prevail, and that their provision for a limited liability upon a shipment at the reduced rate must measure the amount of recovery by the plaintiff so long as those tariffs remain unchanged by the carrier itself and without modification by the Commission.

V.

The bill of lading and contract of release inure to the benefit of the defendant and may be availed of by it.

The bill of lading and contract of release were executed at the same time, and are to be treated as one instrument. The contract of release is expressed to be in favor of the Rock Island Company "and other railroad and transportation companies over whose lines the above property may pass to destination." The notice at the bottom of the contract provides that:

"when household goods are shipped at a rate based on a valuation of $5.00 per hundred pounds, agents will require the owner or consignor to sign the foregoing agreement and the agent must then note on the way bill 'released to valuation of $5.00 per cwt.'"

The bill of lading contains the notice "O. R. Val. 5.00 cwt," an abbreviation of this notice (Rec., 15-16).

These two documents not only established the agreed valuation of $5.00 per hundred pounds, but by the express terms of the contract of release it inured to the benefit of this defendant, as a connecting carrier, within the rule that a contract may be availed of by one who is not a party to it, if it was made for his benefit as one of its expressed objects.

Young v. The Key City, 14 Wall., 653;
Central Tr. Co. v. C. I. & M. Ry. Co., 58 Fed., 500;
Thompkins v. R. R., 102 Ga., 1, c., 445;
Collins v. K. C. M. & E. Co., 110 Pac., 784 (Okla.);
Spear Min. Co. v. Stinn & Co., 124 S. W., 1045 (Ark.);
Chambers v. Phila. P. Co., 75 A., 159 (N. J.);
Eau Claire L. Co. v. Banks, 136 Mo. App., 44;
Luedeche v. Des Moines C. Co., 118 N. W., 456;
Bethlehem Iron Co. v. Hoadley, 152 Fed., 735;
Fish v. Bank, 150 Fed., 524;
Whitehill v. W. U. Tel. Co., 136 Fed., 499.

While the amount involved in this litigation is small, and insufficient in itself to justify an appeal to this court, yet the determination of the right of a carrier to protect itself against exorbitant and fanciful demands by an agreement fairly made, fixing in advance the valuation of the property to be transported, is an exceedingly important matter to all carriers subject to the Interstate Commerce Act. It is earnestly submitted that the common law right of all common carriers in this respect has not been changed or modified by the Hepburn Act, and it is hoped that the decision of the questions involved in this case may be sufficiently broad and comprehensive to finally establish and determine a status of common carriers in this respect, for their future government.

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